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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 272

THE UNITED STATES OF AMERICA, PETITIONER

vs.

FRANK RIZZO, CLAIMANT OF 146,157 GALLONS OF ALCOHOL

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED JULY 23, 1935

CERTIORARI GRANTED OCTOBER 14, 1935

SUPREME COURT OF THE UNITED STATES

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FRANK RIZZO, CLAIMANT OF 146,157 GALLONS OF ALCOHOL

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1 In United States District Court for the District of New Jersey

A–7814

UNITED STATES OF AMERICA, LIBELLANT

against

146,157 GALLONS OF ALCOHOL

Harlan Besson, U. S. Attorney, Trenton, N. J., proctor for libellant.

Minturn and Weinberger, 60 Park Place, Newark, N. J., proctors for claimant.

Docket entries

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4 In United States District Court For the District of New Jersey

Libel

Filed December 22, 1932

To the Honorable the Judges of the United States District Court for the District of New Jersey:

The libel of information of the United States of America by its proctor, Harlan Besson, United States Attorney for the District of New Jersey (by Isador S. Worth, Assistant United States Attorney) against 146,157 gallons of alcohol, in a cause of forfeiture, civil and maritime for breach of provisions of Section 584, Paragraph 814, Section 594 of the Tariff Act of 1930 and Section 4377 of the Revised Statutes of the United States, upon information and belief alleges as follows:

FOR A FIRST CAUSE OF FORFEITURE

1. That at all times hereinafter mentioned libellant was and still is a corporation sovereign.

2. That the Oil Barge "Doris" is an American licensed vessel.

3. That on or about the 12th day of December 1932, prior to the filing of this libel, the said Oil Barge "Doris" was within the admiralty and maritime jurisdiction of the United States of America and within the Federal District of New Jersey, to wit, at the Central Railroad Dock, at Port Johnson, Bayonne, in the District of New Jersey, and was on the date aforesaid lawfully boarded and searched by members of the United States Customs Service.

5 4. That on or about the said time the said Oil Barge "Doris" was seized by officers of the United States Coast Guard as forfeited to the United States for violation of the provisions hereinabove set forth, and that the said vessel has remained and still is in the possession and custody of the Collector of Customs of the Port of New York as forfeited to the United States.

5. That demand was made of the Master and/or the person in charge of said vessel by an officer of the United States, lawfully entitled so to do, for the production of the manifest of the said vessel and that the said manifest was not produced in accordance with said demand and thereupon the said Master or person in charge of said vessel became liable to a penalty of five hundred dollars and the vessel

became subject to forfeiture in accordance with Section 584 of the Tariff Act of 1930.

6. That on said date there was found on board said boat 146,157 gallons of alcohol, which said merchandise was not included or described in the manifest of said vessel and which said merchandise was of the value of $781,939.95.

7. By reason thereof and in accordance with section 584 of the Tariff Act of 1930, the said merchandise became subject to forfeiture and may be libelled therefor in any United States Court.

FOR A SECOND CAUSE OF FORFEITURE

8. The allegations contained in paragraphs 1, 2, 3, and 4 of the first cause of forfeiture are here repeated.

9. That the merchandise described in the paragraphs hereinabove referred to contained more than one-half of one percentum of
6 of alcohol and had been imported into the United States without proper permit for same having been issued as provided for by law.

10. That by reason thereof and under the provisions of paragraph 814 of the Tariff Act of 1930, the said merchandise became subject to forfeiture and may be libelled therefor in any United States Court.

FOR A THIRD CAUSE OF FORFEITURE

11. The allegations contained in paragraphs 1, 2, 3, and 4 of the first cause of forfeiture are here repeated.

12. That on or about the 12th day of December 1932 there was unladened, transshipped to, placed in, and received in the said vessel 146,157 gallons of alcohol, all of the value of $781,939.95, and in violation of the provisions of Section 584 and paragraph 814 of the Tariff Act of 1930; therefore, the Master of the said vessel and any person aiding or assisting thereon became liable to the penalty equal to twice the value of said merchandise, to wit, $1,563,879.90, and the said merchandise became subject to forfeiture in any United States Court.

13. That by all of which as aforesaid the said merchandise became liable in accordance with Section 594 of the Tariff Act of 1930, to be seized and proceeded against summarily by libel to recover the penalties hereinabove set out, and that the said merchandise is subject to forfeiture and may be libelled therefor in any United States Court.

FOR A FOURTH CAUSE OF FORFEITURE

14. The allegations contained in paragraphs 1, 2, 3, and 4 of the first cause of forfeiture are here repeated.

7 15. That on or about the 12th day of December 1932 the said Oil Barge "Doris" was employed in a trade other than that for which she was licensed, to wit, the transportation of intoxi-

cating liquor within the territorial waters of the United States, to wit, at Port Johnson, Bayonne, in the District of New Jersey.

16. That the trade of transporting intoxicating liquor in the territorial waters of the United States in the District of New Jersey on December 12, 1932, in which trade said vessel was engaged was an illicit trade.

17. That by reason of the premises said ——— ——— became and is subject to seizure and forfeiture by the United States pursuant to the provisions of Section 4377 of the Revised Statutes of the United States and may be libelled therefor in any United States Court.

Wherefore, libellant prays that process in due form of law according to the course and practice of this Honorable Court in causes of admiralty and maritime jurisdiction may issue against the said 146,157 gallons of alcohol and that all persons, claiming any right, title, or interest therein may be cited to appear and answer on oath all and singular the matter aforesaid, and that the libellant may have such other and further relief as in law and justice it may be entitled to recover.

HARLAN BESSON,
United States Attorney, District of New Jersey.
By ISADOR S. WORTH,
Asst. United States Attorney.

Dated December 21, 1932.

8 In United States District Court, District of New Jersey

Monition

Filed December 30, 1932

The President of the United States of America, to the Marshal of the District of New Jersey, Greeting:

Whereas a libel was filed in the District Court of the United States, for the District of New Jersey, on the 22nd day of December by the United States of America, against 146,157 gallons of alcohol, found on Oil Barge "Doris", for the reasons and causes in the said Libel mentioned, and praying the usual process and monition of the said Court in that behalf to be made, and that all persons interested in the said 146,157 gallons of alcohol may be cited in general and special, to answer the premises, and all proceedings being had, that the said 146,157 gallons of alcohol may, for the causes in the said Libel mentioned, be condemned and sold to pay the demands of the Libellant.

You are therefore hereby commanded to attach the said 146,157 gallons of alcohol and to detain the same in your custody until the further order of the Court respecting the same, and to give due notice to all persons claiming the same, or knowing or having anything to say why the same should not be condemned and sold pur-

suant to the prayer of the said Libel, that they be and appear
9 before the said Court to be held at Trenton, in and for the District of New Jersey, on the 13th day of January 1933 at 10 o'clock in the forenoon of the same day, if the same shall be a day of jurisdiction, otherwise on the next day of jurisdiction thereafter, then and there to interpose a claim for the same, and to make their allegations in that behalf. And what you shall have done in the premises, do you then and there make reurn thereof, together with this Writ.

Witness, the Honorable William Clark, Judge of said Court at the City of Trenton, in the District of New Jersey, this 22nd day of December 1932.

[SEAL]

GEORGE T. CRANMER,
Clerk.
By ROSE O. MCCULLOUGH,
Deputy.

NOTICE OF SERVICE

In obedience to the within monition, I attached the 146,157 Galls. Alcohol therein described on the 24 day of Dec. 1932, and have given due notice to all persons claiming the same that this Court will, on the 13 day of Jan. 1933 (if that day shall be a day of jurisdiction, if not, on the next day of jurisdiction thereafter), proceed to the trial and condemnation thereof, should no claim be interposed for the same.

F. C. SCHNEIDER,
U. S. Marshal.
By G. W. LUNT,
Dep.

Dated Dec. 24, 1932.

I attached the 146,157 Galls. Alcohol on board Oil Barge "Doris" lying at pier 6 Hoboken by tacking 2 Notices on Barge & serving Copy of Monition on J. H. McGill, Asst. Surveyor at Barge Office, New York.

10 In United States District Court for the District of New Jersey

On Libel for Condemnation

UNITED STATES OF AMERICA

v.

146,157 GALLONS OF ALCOHOL, DEFENDANT

Answers and exceptions

Filed December 23, 1932

Claimant appearing herein by Minturn & Weinberger, Esquires, answering the libel, and by way of exceptions to this libel alleges:

1. Claimant alleges that he has filed a notice of claim for the said 146,157 gallons of alcohol, the subject matter of the libel herein filed.

2. Paragraphs 1 and 2 of said libel are admitted.

3. As to paragraph 3 of said libel, claimant admits so much thereof as states that the oil barge "Doris" was at the Central Railroad dock at Port Johnson, Bayonne, in the District of New Jersey. The rest of paragraph 3 is denied.

4. Paragraph 4 is admitted.

5. Paragraph 5 is denied.

6. Paragraph 6 is admitted.

7. Paragraph 7 is denied.

As to Second Cause of Forfeiture

8. Each of the answers made to paragraphs 1, 2, 3, and 4 of
11 the first cause of forfeiture are re-alleged and repeated as though herein fully and at large set forth.

9. Paragraphs 9 and 10 are denied.

As to Third Cause of Forfeiture

10. Each of the answers made to paragraphs 1, 2, 3, and 4 of the first cause of forfeiture are re-alleged and repeated as though herein fully and at large set forth.

11. Paragraphs 12 and 13 are denied.

As to Fourth Cause of Forfeiture

12. Each of the answers made to paragraphs 1, 2, 3, and 4 of the first cause of forfeiture are re-alleged and repeated as though herein fully and at large set forth.

13. Paragraphs 15, 16, and 17 are denied.

EXCEPTIONS TO THE LIBEL

As to First Cause of Forfeiture

Claimant alleges that said libel is insufficient and fails to set forth a cause of forfeiture under Section 584 of the Tariff Act of 1930, in that:

1. The said libel fails to allege that the said oil barge "Doris" was a vessel bound to the United States from a foreign port.

2. The said oil barge "Doris" was not required by law to possess a manifest.

As to Second Cause of Forfeiture

Claimant alleges that said libel is insufficient and fails to set forth a cause of forfeiture under Section 814 of the Tariff Act of 1930 in that:

12 1. The said 146,157 gallons of alcohol were not imported into the United States of America.

As to Third Cause of Forfeiture

Claimant alleges that the third cause of forfeiture is insufficient and fails to set forth a cause of forfeiture under Section 594 of the Tariff Act of 1930, in that:

1. The said Section 594 of the Tariff Act of 1930 is applicable solely to vessels or vehicles and not to the merchandise or subject matter thereon contained.

As to Fourth Cause of Forfeiture

Claimant alleges that the fourth cause of forfeiture is insufficient and fails to set forth a cause of forfeiture under Section 4377 of the Revised Statutes of the United States, in that:

1. The said oil barge "Doris" was not employed in the trade of transporting intoxicating liquor.

EXCEPTION TO LIBEL GENERALLY

Claimant excepts to the libel generally, and all four causes of forfeiture therein set forth, in that:

1. The said search and seizure of the 146,157 gallons of alcohol was illegal and unlawful and without probable cause and in violation of claimant's rights under the Fourth and Fifth Amendments to the Constitution of the United States of America.

Wherefore claimant respectfully prays that the libel for condemnation filed herein be dismissed, and that the said 146,157 gallons of alcohol should be forthwith returned to him.

MINTURN & WEINBERGER,
Attorneys of Claimant.

13 In United States District Court

Notice of claim.

Filed December 23, 1932

And now comes Frank Rizzo, intervening as owner of said 146,157 gallons of alcohol, and appears before this Honorable Court, and makes claim to the said 146,157 gallons of alcohol as the same is attached by the marshal under process of this Court, at the instance of the United States of America; and the said Frank Rizzo states that at the time of the attachment thereof the said Frank Rizzo was and is the true and bona fide owner of the said 146,157 gallons of alcohol, and that no other person is the lawful owner thereof.

FRANK RIZZO.

Sworn and subscribed to before me this twenty-third day of December 1932.

MERIE STRAZZA,
A Notary Public of New Jersey.

14 In United States District Court

Notice of motion to dismiss

Filed December 23, 1932

To HARLAN BESSON, Esq.,
United States Attorney, Trenton, N. J.

SIR: Please take notice that upon the annexed affidavit of Harry H. Weinberger, of the firm of Minturn & Weinberger, Esqs., and upon the exceptions to the said libel heretofore filed, a motion will be made herein in the United States District Court for the District of New Jersey, at the Lefcourt Building, in the City of Newark, on Tuesday, the twenty-seventh day of December 1932, at 10:30 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for an order dismissing the libel herein, and for such other and further relief as to this Honorable Court may seem just and proper in the premises.

Dated December 23, 1932.

MINTURN & WEINBERGER,
Attorneys for Claimants.

AFFIDAVIT

STATE OF NEW JERSEY,
County of Essex, ss:

Harry H. Weinberger, of the firm of Minturn & Weinberger, Esqs., being duly sworn on his oath according to law, deposes and says:

1. That he is the attorney for the claimant herein.

2. That the libel herein instituted for the forfeiture of the
15 said 146,157 gallons of alcohol, for a breach of provisions of Section 584, paragraph 814, Section 594 of the Tariff Act of 1930, and Section 4377 of the Revised Statutes of the United States.

3. The claimant herein has appeared and filed an answer and exceptions to the said libel. Your deponent now moves on the exceptions so filed for a dismissal of the said libel, and for the following reasons:

As to First Cause of Forfeiture

1. That the said first cause of forfeiture fails to allege that the said oil barge "Doris" was a vessel bound to the United States from a foreign port.

2. The said oil barge "Doris" was not required by law to possess a manifest.

As to Second Cause of Forfeiture

1. The said 146,157 gallons of alcohol were not imported into the United States of America.

As to Third Cause of Forfeiture

1. The said Section 594 of the Tariff Act of 1930 is applicable solely to vessels or vehicles and not to the merchandise or subject matter thereon contained.

As to Fourth Cause of Forfeiture

1. The said oil barge "Doris" was not employed in the trade of transporting intoxicating liquor.

EXCEPTION TO LIBEL GENERALLY

1. The said search and seizure of the 146,157 gallons of alcohol was illegal and unlawful and without probable cause and in violation of claimant's rights under the Fourth and Fifth Amendments to the Constitution of the United States of America.

16 Your deponent will move for such other and further relief as to this Honorable Court may seem just and proper.

HARRY H. WEINBERGER.

Sworn and subscribed to before me this twenty-third day of December 1932.

MERIE STRAZZA,
A Notary Public of New Jersey.

In United States District Court

Exceptive allegations to claim

Filed December 27, 1932

The libellant above named hereby excepts to the claim of Frank Rizzo, claimant in this cause, as follows:

1. That the said Frank Rizzo is not the true and bona fide owner of the said 146,157 gallons of alcohol as alleged in the verified claim heretofore filed in this cause by the said Frank Rizzo, and that he is without lawful right or authority to make claim of the said 146,157 gallons of alcohol attached by the United States Marshal in and for the District of New Jersey under process of this Court.

2. That the said 146,157 gallons of alcohol mentioned and described in the said claim of the said Frank Rizzo is intoxicating liquor fit for beverage purposes, containing one-half of 1 percent of alcohol by volume and is and was the property of the United States of America at the time of the seizure thereof because the said alcohol was not in containers as prescribed by the laws of the United States of

17 America, nor was it stamped and branded, nor was it in containers stamped and branded, nor in a bonded warehouse, as prescribed by the laws of the United States of America.

3. That the said 146,157 gallons of alcohol was intoxicating liquor fit for use for beverage purposes, containing one-half of 1 percent of alcohol by volume and was intended by the said Frank Rizzo or divers persons yet unknown to the libellant for use in violation of the provisions of Title II, of the National Prohibition Act, and that no property rights exist in the said 146,157 gallons of alcohol and no claim can be lawfully filed by anyone.

HARLAN BESSON,
United States Attorney.

Dated December 27, 1932.

18 In United States District Court

Amended answers and exceptions to libel

Filed December 28, 1932

Claimant appearing herein, by Minturn & Weinberger, Esquires, making amendment to the answers and exceptions to the libel heretofore filed in this cause, amends the same to read as follows:

1. Claimant alleges that he has filed a notice of claim for the said 146,157 gallons of alcohol, the subject matter of the libel herein filed.
2. Paragraph 1 of said libel is admitted.
3. Paragraphs 2 and 3 of said libel are denied.
4. Paragraph 4 of said libel is denied.
5. Paragraph 5 of said libel is denied.
6. Paragraph 6 of said libel is denied.
7. Paragraph 7 of said libel is denied.

As to Second Cause of Forfeiture

8. Each of the answers made to paragraphs 1, 2, 3, and 4 of the first cause of forfeiture are realleged and repeated as though herein fully and at large set forth.
9. Paragraphs 9 and 10 are denied.

As to Third Cause of Forfeiture

10. Each of the answers made to paragraphs 1, 2, 3, and 4 of
19 the first cause of forfeiture are realleged and repeated as though herein fully and at large set forth.
11. Paragraphs 12 and 13 are denied.

As to Fourth Cause of Forfeiture

12. Each of the answers made to paragraphs 1, 2, 3, and 4 of the first cause of forfeiture are realleged and repeated as though herein fully and at large set forth.
13. Paragraphs 15, 16, and 17 are denied.

EXCEPTIONS TO THE LIBEL

As to First Cause of Forfeiture

Claimant alleges that said libel is insufficient and fails to set forth a cause of forfeiture under Section 584 of the Tariff Act of 1930, in that:

1. The said libel fails to allege that the said oil barge "Doris" was a vessel bound to the United States from a foreign port, and further fails to allege that the said vessel arrived in the United States from a foreign port.

2. The said oil barge "Doris" was not required by law to possess a manifest.

As to Second Cause of Forfeiture

Claimant alleges that said libel is insufficient and fails to set forth a cause of forfeiture under Section 814 of the Tariff Act of 1930 in that:

1. The said 146,157 gallons of alcohol were not imported into the United States of America.

20 As to Third Cause of Forfeiture

Claimant alleges that the third cause of forfeiture is insufficient and fails to set forth a cause of forfeiture under Section 594 of the Tariff Act of 1930, in that:

1. The said Section 594 of the Tariff Act of 1930 is applicable solely to vessels or vehicles and not to the merchandise or subject matter thereon contained.

As to Fourth Cause of Forfeiture

Claimant alleges that the fourth cause of forfeiture is insufficient and fails to set forth a cause of forfeiture under Section 4377 of the Revised Statutes of the United States in that:

1. The said oil barge "Doris" was not employed in the trade of transporting intoxicating liquor.

EXCEPTIONS TO LIBEL GENERALLY

Claimant excepts to the libel generally, and all four causes of forfeiture therein set forth, in that:

1. The said search and seizure of the 146,157 gallons of alcohol was illegal and unlawful and without probable cause and in violation of claimant's rights under the Fourth and Fifth Amendments to the Constitution of the United States of America.

Wherefore claimant respectfully prays that the libel for condemnation filed herein be dismissed and that the said 146,157 gallons of alcohol should be forthwith returned to him.

MINTURN & WEINBERGER,
Attorneys of Claimant.

21 [*Duly sworn to by Wm. N. Margolis; jurat omitted in printing.*]

22 In United States District Court

Amendment to libel

Filed December 30, 1932

Now comes the libellant, the United States of America, by leave of the Court first had and obtained, to amend the libel heretofore filed in the above-entitled cause, by inserting the following paragraphs in the place and stead of the fifteenth and sixteenth paragraphs of the fourth cause of forfeiture:

15. That on the twelfth day of December 1932, and during all of the time of the occurrences mentioned and described in this cause of forfeiture, the said oil barge "Doris" was enrolled and licensed to carry on the coasting trade pursuant to the laws of the United States of America; that on the twelfth day of December 1932 aforesaid, at Port Johnson, Bayonne, in the State of New Jersey, in the District of New Jersey, and within the jurisdiction of this Court, the said oil barge "Doris" was employed in a trade for which she was not licensed, in that she was unlawfully transporting and unlawfully possessing in transportation a large quantity of intoxicating liquor fit for use for beverage purposes and containing one-half of 1 per-cent or more of alcohol by volume, to wit: one hundred and forty-six thousand one hundred and fifty-seven gallons (146,157) of alcohol, in violation of the provisions of Section 3, Title II, of the National Prohibition Act.

16. That by reason of the premises said one hundred and forty-six thousand one hundred and fifty-seven (146,157) gallons of alcohol became and are subject to seizure and forfeiture by the United

23 States of America pursuant to the provisions of Section 4377 of the Revised Statutes of the United States of America, also known as Section 325, Title 46, United States Code Annotated.

HARLAN BESSON,
United States Attorney.

Dated December 28, 1932.

ORDER

On this ——— day of December 1932 I allow the within amendment to the libel filed in this cause and direct that the clerk file the same.

———,
Judge.

In United States District Court

Exceptions to answer

Filed January 3, 1933

The libellant reserving its right to press its exceptions to the claim filed by the claimant in the above-named cause and without waiving any of its rights acquiring by the filing of such exceptions hereby excepts to the answer filed by the claimant in the above-named cause for the following reason:

1. Because said answer is not verified as prescribed by the rules in admiralty of the United States Supreme Court.

Dated January 3, 1933.

HARLAN BESSON,
United States Attorney.

24 In United States District Court

Memorandum

Filed March 22, 1933

FORMAN, District Judge:

On December 22, 1932, the government filed a libel against the Oil Barge "Doris" and one against 146,157 gallons of alcohol allegedly found on board. Similar libels were filed against the Motor Oil Screw "Evelyn" and 4½ gallons of alcohol allegedly found on board and against the Oil Barge "Helen" and 3 gallons of alcohol.

On December 23, 1932, one Frank Rizzo filed a "notice of claim" under oath alleging ownership of the 146,157 gallons of alcohol.

On the same day Matoil Service & Transport Company, Inc., claimed ownership in the three vessels. The notices of claim are signed and verified by Samuel Kessler as attorney of the claimant.

On the same day both claimants filed answers and exceptions and gave notices of motions to dismiss the libels.

The United States Attorney on December 27, 1931, filed "exceptive allegations" to the claims and the matter came on for hearing pursuant to the notice to dismiss the libels on December 30, 1932, and was continued until January 27, 1933.

The seizure upon which the libels are based took place at Port Johnson, Bayonne, New Jersey, on the afternoon of December 12, 1932. Information concerning one or more of these vessels had come to the Headquarters of the Coast Guard and Customs Guard George Pernisco with a party of customs guards and Boatswain Oscar E. Carlson with a number of coast guardsmen made the seizures. They found the boats lying alongside of each other at a wharf at Port Johnson.

25 No one being in evidence, they boarded the Oil Barge "Doris" and lifted a manhole cover and perceived the cargo of alcohol. On boarding the Motor Oil Screw "Evelyn" they met Frank Rizzo, and the Customs Guard Pernisco had a conversation with him, during which Rizzo said, "I am just a watchman hired this afternoon by a man named Rogers."

Rizzo now claims to be the owner of the alcohol.

The government in its exceptive allegations joined the issue of ownership, and at the hearing the government officials testified, but the claimants relied upon their notices of claim and offered no testimony as to their ownership.

The claimants rest upon the theory that the search being illegal, the government never obtained any rights under the seizure.

Therefore, the first question to be considered here is whether the claimants have such standing that they may question the legality of the government's seizures.

Obviously no person can complain of a seizure unless his constitutional rights have been invaded. It is elementary that a mere passerby or some entirely disinterested person cannot question the acts of the government in its seizure. Therefore the attack upon the seizure must emanate from the owner of the res or from a person who at the time of the seizure was clothed with such attributes of ownership as to make the seizure of the res an invasion of his rights under the fourth amendment to the Constitution.

In this case we are not persuaded that the claimants have established such a status as warrants their attack upon the libel.

Rizzo has filed a writing (verified, it is true) making claim to the 146,157 gallons of alcohol and states therein "that at the time of the attachment thereof the said Frank Rizzo was and is the true bona fide owner of the said 146,157 gallons of alcohol and that no other person is the true and lawful owner thereof."

26 The Matoil Service & Transport Company, Inc., filed a claim for the boats, signed by their attorney and verified by him "upon information and belief."

The government by its pleadings contested the allegations of ownership in all of these claims.

No testimony was adduced by either side as to ownership or lack of ownership with regard to the claimant, Matoil Service & Transport Company, Inc.

As to the claim of Rizzo, although allegedly in court, he did not even by his own oral testimony substantiate his claims of ownership, but chose to remain silent.

The government, on the other hand, produced at least one witness who testified that this self-same Rizzo had at the time of the seizure represented himself to be but a watchman hired only a few hours previously.

When the government, as in this case, has definitely put into issue the purported ownership of the claimants, the proceedings can then follow but one logical channel. The claimants must prove their alle-

gations of ownership. If the ownership is in the "good faith" alleged by these claimants in their written claims no hardship is imposed upon them by this requirement.

Here no effort was made by the claimants in this direction other than the perfunctory filing of the written claims, and upon this allegation of their respective rights they seek to take advantage of all the protection made available by the Constitution and reserved only for those persons who have bona fide status to claim it.

Upon the question of proof of ownership relevant comment was made by Judge Woolsey, of the Southern District of New York, in "The Sebastapol", 47 Fed. (2d) 336, wherein he said:

27 "In situations such as we have here, where proceedings in rem against vessels are involved, if their owners come into court as claimants thereto, they come in as actors in the proceedings, for they are in effect petitioners asking for a favor—to have their ships returned to them. U. S. v. 422 Casks of Wine, 1 Pet. 547, 549, 550, 7 L. Ed. 257. *On such a petition the burden is on them to show their ownership, their present right to possession of the vessel.* The R. W. Skillinger, 1 Flip. 436, 21 Fed. Cas. 102, 103, No. 12, 181, and, in the case of a forfeiture proceeeding under Sec. 26 of Title II of the National Prohibition Act, their innocence of complicity in the acts for which the forfeiture is sought, cf. U. S. v. One Hundred Twenty-nine Packages, 27 Fed. Cas. 284, 285, 286, No. 15,941. At this point in any case in rem issue may be joined under a practice long familiar to determine the claimant's locus standi. U. S. v. 422 Casks of Wine, 1 Pet. 547, 549, 550, 7 L. Ed. 257; The Two Marys (D. C.) 10 F. 919, 920, 928; The Steamer Spark v. Lee Choi Chum, 1 Sawy. 718, 22 Fed. Cas. 871, 873, No. 13,206. The Prindiville, 1 Browns Adm. 487, 19 Fed. Cas. 1345, 1346, No. 11,435; U. S. v. One Hundred Barrels of Cement, 27 Fed. Cas. 292, 293, No. 15,945."

Not only is such a showing necessary in a proceeding in rem but in criminal cases as well a motion to suppress evidence will not prevail unless the moving party be one whose constitutional rights are imperiled.

In the case of Connolly v. Medalie, 58 Fed. (2d) 629, the petitioner was, as here, a "watchman", and the court held as follows:

"We assume for argument that the search and seizure were unlawful; and that any persons aggrieved might suppress the evidence so acquired. None of the petitioners fall within that class. Although Connolly alleged that he was in 'sole charge, possession, and
28 control' of the brewery, it was only as a 'watchman.' This relation to the property did not make its invasion a wrong to him, his supposed 'possession' was not such at all. He was only a servant on the premises, and, certainly in New York, had no possession; possession remained in his employer. Kerrains v. People, 60 N. Y. 221, 19 Am. Rep. 158; Presby v. Benjamin, 169 N. Y. 337, 62 N. E. 430, 57 L. R. A. 317; Haywood v. Miller, 3 Hill (N. Y.) 90; Napier v. Spielmann, 127 App. Div. 567, 111 N. Y. S. 983. The entry

and the search which followed were, therefore, no wrong to him, but to the Neversink companies, which were the owners, if he be right. He would for this reason be unable to secure a return of the property seized."

Judge Learned Hand, of the Second Circuit, then cites an entire collection of cases upon the subject, including Chepo v. United States, 3d C. C. A. (N. J.) 46 Fed. (2d) 70.

The claimants' theory seems to be that by filing the sworn notices of claim they have cast themselves in the roles of actors in the proceedings and that no further proof of ownership is necessary, even though their claims are negatived by the government pleadings. They argue that a seizure illegally obtained must be returned. The cases they cite support such a contention but the query still remains—who has the right to raise the question of the legality or illegality of the search, and what quantum of proof is necessary to demonstrate his status?

In all of said cases cited by the claimants the owners either appear or the question of ownership is definitely not made an issue by the pleadings. Every case cited by claimants is distinguished in these respects from the case at bar.

I find at this preliminary stage of the proceedings that sufficient proof of ownership has not been adduced by the claimants to warrant the summary dismissal of the libel, and consideration of
29 the actual legality of the search and seizure is made unnecessary now. The motions to dismiss the libels will be denied.

In view of the large expense attendant upon the storage of these seizures, pending the litigation, the cases may be set down for final hearing at as early a date as convenient to all parties concerned. Meanwhile, the United States Attorney should make application to increase the indemnification for costs furnished by the claimants, in the event that the government should be finally sustained.

In United States District Court

Memorandum

Filed May 9, 1933

FORMAN, District Judge:

The facts in the above causes are stated to some extent in the memorandum heretofore filed herein on March 22, 1933.

The matters were brought on for final hearing and proofs were offered as to the ownership of the alcohol by the claimant Rizzo and as to the boats by the claimant Matoil Service Company, Inc.

AS TO THE 146,157 GALLONS OF ALCOHOL

The sole question involved here is:

Has the claimant Rizzo established his status as a bona fide owner of the said alcohol?

The claimant took the stand and produced certain documents indicating the transfer to him of the charters covering these boats together with "what was on deck and below deck" as he put it.

He stated that this transaction was had with a Mr. Rogers:
30 He paid $5,000 as an installment on a total consideration of $26,000. As part of the $5,000 installment he borrowed $1,000 from Harry Goldberg, $1,500 from Tony Lombardo, and $1,000 from Sam Calamano. The balance he paid from his own funds.

He alleged that he was the owner of the cargo aboard the "Doris" and in fact after his negotiations accompanied all three vessels on their voyage from Nyack to Port Johnson, in what capacity is not clear, but, as he says, "Just took a joy ride" (Record, p. 483).

He produced several witnesses, employees about the dock at Port Johnson, who testified that on several occasions he was seen about the boats as if in charge, and Captain Walsh, in charge of the dock, gave it as his information that Rizzo was in charge of the boats and actually paid wharfage for them.

In response to numerous questions as to the cargo of the "Doris" and other particulars, he replied that he refused to answer on the ground that he might incriminate himself.

The claimant's only occupation had been that of a seaman at $80.00 per month. He had, however, not recently pursued this calling, deriving his income from gambling at cards and on race horses.

In connection with the so-called documents of title, it is important to note that the alleged assignment to the claimant reads as follows:

"EXHIBIT C–17

"NOVEMBER 22, 1932.

"In consideration of the sum of one dollar and other good and valuable consideration to me in hand paid I hereby assigned all my right, title, and interest in the charter on the other side to Tow Barge "Doris" to Frank Rizzo, of Bayonne, N. J.

"ROGERS OIL AND SUPPLY CO.
"GEORGE ROGERS, *Pres.*"

31 The assignments of the charters of the other two vessels are in identical language.

Although the claimant alleges that he became possessed thereby of everything on and below decks, there is nothing in the language of the assignment indicating a transfer of the cargo to him.

He did not know the whereabouts of Mr. Rogers, who had negotiated with him concerning this cargo (the value of which might well run into the hundreds of thousands of dollars), nor did he know the whereabouts of his friends, Harry Goldberg, from whom he had borrowed $1,000, Tony Lombardo $1,500, or Sam Calamano another $1,000, notwithstanding the fact that they practically capitalized the venture for him.

The very essence of the status of the claimant is his good faith. He has sworn in his claim that he is the true and bona fide owner of this alcohol.

In substantiation of his claim he tells a weird story peopled by disappearing characters, and then although claiming under oath the cargo of alcohol, in so many words, when cross-examined upon the subject he seeks refuge in the stereotyped reply, "I refuse to answer because it may incriminate me."

In this connection his counsel argues "that it was the plain duty of the Court to ascertain the merit of the refusal."

Counsel cites an excerpt from the decision of Chief Justice Marshall in the case of United States v. Aaron Burr, 25 Fed. Cas., pp. 38, et seq (case No. 14692e), but unhappily is misled by reading too meagerly from the opinion.

Following is the language of the Chief Justice, and the italicized portion is the phraseology counsel failed to quote:

"When a question is propounded it belongs to the court to consider and to decide whether any direct answer to it can im-
32 plicate the witness. If this be decided in the negative, then he may answer it without violating the privilege which is secured to him by law. *If a direct answer to it may criminate himself, then he must be the sole judge what his answer would be. The court cannot participate with him in this judgment, because they cannot decide on the effect of his answer without knowing what it would be; and a disclosure of that fact to the judges would strip him of the privilege which the law allows and which he claims. It follows necessarily then * * * that if the question be of such a description that an answer to it may or may not criminate the witness, according to the purport of that answer, it must rest with himself, who alone can tell what it would be, to answer the question or not. If, in such a case, he say upon his oath that his answer would criminate himself, the court can demand no other testimony of the fact.*"

This objection comes with rather poor grace from one craving the privilege of immunity. Here is an applicant for a large quantity of contraband objecting when the court has, without question, permitted him to avail himself of the privilege. He swears that to answer will incriminate him, and in view of the delicacy of the entire issue, any questions by the court might have elicited answers involving him in not only the obvious crime but in others as well.

After the government witnesses had testified that the claimant had stated at the time of the seizure that he was merely a watchman, he admitted that he made such a statement. He further admitted that he gave as his place of residence an address that did not exist.

His ideas on truth telling are illuminated by the following colloquy with the Court (Record, p. 492, et seq.):

"Q. Why did you tell Mr. Pernisco you were only a watchman hired about a half a day before that time and that Mr. Rogers was the owner of this ship's cargo or words to that effect?"

33 "A. Mr. Rogers was the owner up until only a couple of days before that, and I wanted to know how I stood before I was going to admit that I was the owner."

"Q. Do you know how you stand now?"

"A. No, sir."

"Q. Why do you now admit something different from what you told the government officers before?"

"A. I would like to get the cargo back, if possible, and the boats."

"Q. What you told the officers that time is a lie; is that right?"

"A. Yes, sir."

* * * * * * *

"Q. It makes a difference to you when you are talking whether you are under oath or not?"

"A. Yes, sir."

Is this the type of testimony calculated to inspire the confidence of the court in the integrity or bona fides of the claim, or does it not rather demonstrate a willingness and a capacity upon the part of the claimant to say or do anything to "get the cargo back, if possible, and the boats", although he does not even lay claim to the latter?

With a brazen effrontery, seldom, if ever, exceeded or even equalled in this or any other court, the claimant makes demand for this contraband.

Confessedly a professional gambler and a liar, his testimony and his demeanor characterize him as an underworld operator, the like of whom there are too many in the country today. He has, in the opinion of this court, failed entirely to establish the bona fides of his claim and he has stamped himself as unworthy of the slightest belief.

Conforming with my decision on the motion to dismiss the libel, I now find that this claimant has no status from which he can attack the same and a decree of forfeiture will be entered against this 146,157 gallons of alcohol.

34 AS TO THE VESSELS "DORIS", "HELEN", AND "EVELYN"

The court feels that the ownership of these vessels has been definitely established in a corporation known as the Matoil Service and Transport Company, Inc. The evidence discloses a generous intra-corporate arrangement whereby large financial obligations were assumed by a now absent Mr. Rogers to the very definite advantage of Captain Mathiason. Still there is no evidence impugning the good faith of the said Mathiason such as to lay the foundation for a belief that the said corporation was not the bona fide owner of these vessels.

We are therefore brought to a consideration of the question of whether there was a lawful seizure of the same.

They were taken, while tied together in dock, by the Coast Guard and Customs officials, acting jointly, without a warrant, after they had been boarded and a customs officer had lifted a manhole plate and discovered the vast quantity of alcohol aboard the "Doris."

The vessels are charged in the respective libels with violations of Sections 584, 594, and 814 of the Tariff Act of 1930 (19 U. S. C. A., § 1584, § 1594, and § 1001, par. 814, Schedule 8) and R. S., section 4377 (46 U. S. C. A., section 325).

Customs officers, since the beginning of the Government, have been charged with the enforcement of the navigation laws. The first authority to board and search vessels in this connection was contained in section 27 of the Act of February 18, 1793 (1 Stat. 305), which was an act providing for the enrollment and licensing of vessels in the coasting trade and fisheries. The said section reads as follows:

35 "That it shall be lawful for any officer of the revenue to go on board of any ship or vessel, whether she shall be within or without his district, and the same to inspect, search, and examine, and if it shall appear that any breach of the laws of the United States has been committed, whereby such ship or vessel, or the goods, wares, and merchandise on board, or any part thereof, is or are liable to forfeiture, to make seizure of the same."

This statute was never specifically repealed. It appeared in the "Revision of the United States Statutes as drafted by the Commissioners" (1872) as section 320, title 36, chapter 10. It did not, however, appear in the final draft of the Revised Statutes, presumably because the substance thereof was contained in section 3059.

The Act of March 2, 1799 (1 Stat. 627), a customs revenue law, provided in Section 54 that "it shall be lawful for all collectors, naval officers, surveyors, inspectors, and the officers of the revenue cutters, as hereinafter mentioned, to go on board of ships or vessels in any port of the United States, or within four leagues of the coast thereof, if bound to the United States, whether in or out of their respective districts, for the purpose of demanding the manifests aforesaid and of examining and searching the said ships or vessels; and the said officers, respectively, shall have free access to the cabin and every other part of a ship or vessel; * * *.

Section 70 of the same act provided that:

"It shall be duty of the several officers of the customs to make seizure of and secure any ship or vessel, goods, wares, or merchandise which shall be liable to seizure by virtue of this or any other act of the United States respecting the revenue which is now or may hereafter be enacted, as well without as within their respective districts."

36 The said sections 54 and 70 were reenactments of similar provisions of prior laws. The acts of February 4 and March 3, 1815 (1 Stat. 195) (251), respectively, authorized certain classes of customs officers to board, search, and examine any vessel in their own or other customs districts and to seize any merchandise subject to forfeiture by reason of attempted evasion of duty or of having been imported contrary to law.

On July 18, 1866, there was passed "An Act further to prevent smuggling, and for other purposes" (14 Stat. 178), section 2 of which provided as follows:

"That it shall be lawful for any officer of the customs, including inspectors and occasional inspectors, or of a revenue cutter, or authorized agent of the Treasury Department, or other person specially

appointed for the purpose in writing by a collector, naval officer, or surveyor of the customs, to go on board of any vessel, as well without as within his district, and to inspect, search, and examine the same and any person, trunk, or envelope on board, and to this end to hail and stop such vessel, if under way, and to use all necessary force to compel compliance; and if it shall appear that any breach or violation of the laws of the United States has been committed whereby or in consequence of which such vessel or goods, wares, and merchandise, or any part thereof, on board of or imported by such vessel is or are liable to forfeiture, to make seizure of the same, or either or any part thereof, and to arrest or, in case of escape or any attempt to scape, to pursue and arrest any person engaged in such breach or violation; * * *."

Section 24 of the same act provided that:

"if any certificate of registry, enrollment, or license, or other record or document granted in lieu thereof, to any vessel shall be knowingly and fraudulently obtained or used for any vessel not
37 entitled to the benefit thereof, such vessel, with her tackle, apparel, and furniture, shall be liable to forfeiture."

Section 24 is a navigation law and by its inclusion in the same act it is apparent that section 2 of the Act of 1866 was intended to aid customs officers in detecting violations of the navigation laws as well as of the customs laws.

Section 2 of the Act of 1866, which became section 3059 of the Revised Statutes, contained the substance of section 27 of the Act of February 18, 1793, and of section 54 of the Act of March 2, 1799, and apparently superseded them. Nevertheless, the substance of section 54 was for some reason incorporated in the Revised Statutes as section 3067. Section 3059 is somewhat broader than section 3067 in that the right to board and search is not confined to vessels bound to the United States and it provides for seizure in the event reasons for forfeiture are discovered. Both sections were superseded by section 581 of the Tariff Act of 1930.

It will be seen that none of the statutes above mentioned imposes any express restriction as to the purposes for which vessels may be boarded and searched by customs officers. It may be argued that there is an implied restriction, that is, that the right to board and search may be exercised by customs officers only within the scope of their duties, but this does not prevent the exercise of the right for the purpose of enforcing the navigation laws for that is part of the duties of customs officers and such right has been exercised by them in this behalf since the foundation of the government. Customs officers have from time immemorial been charged specifically or by implication with the enforcement of many and various laws besides those pertaining solely to the protection of the revenue.

38 But even though it were held that because the specific authority to board and search has, with one or two exceptions, been contained in laws primarily for the protection of the revenue and that, therefore, such right can be exercised only for the purpose

of protecting the revenue, the Supreme Court has held that the navigation laws are laws "respecting the revenue" within the meaning of section 3072 R. S. (Maul v. United States, 274 U. S. 501). In this connection the court stated that:

"The sections violated are found in a subdivision of the revised statutes entitled 'regulation of vessels in domestic commerce' but the arrangement of sections in the revision is without special significance, Rev. Stats., section 5600. That subdivision includes several provisions designed to regulate commerce by vessels and also to protect the revenue, *these being related subjects.* A reading of the sections violated in connection with others in the same subdivision makes it plain that they are directed to the protection of the revenue; and therefore they come within the terms of section 3072. That they are also regulations of commerce by vessels does not make them any the less laws respecting the revenue."

Section 5600, Revised Statutes, referred to in the above quotation, reads as follows:

"The arrangement and classification of the several sections of the revision have been made for the purpose of a more convenient and orderly arrangement of the same, and therefore no inference or presumption of a legislative construction is to be drawn by reason of the title under which any particular section is placed."

The following language of the Supreme Court in Gelston v. Hoyt (3 Wheaton, 246, 310) is significant as throwing light upon the construction of section 581:

39 "The Act of the second of March 1799, chapter 128, section 70, makes it the duty of the several officers of the customs to make seizures of all vessels and goods liable to seizure by virtue of any act of the United States respecting the revenue; and assuming the statute of 1798, page 50, not to be a revenue law within the meaning of this clause, still the case falls within the broader language of the Act of the eighteenth of February 1793, chapter 8, section 27, which authorizes the officers of the revenue to make seizure of any ship or goods, where any breach of the laws of the United States has been committed."

As stated above, the substance of Section 27 of the Act of 1793, which was incorporated in section 3059 of the Revised Statutes, was continued in section 581 of the present tariff act, as follows:

"Officers of the customs or of the Coast Guard, and agents or other persons authorized by the Secretary of the Treasury, or appointed for that purpose in writing by a collector, may at any time go on board of any vessel or vehicle at any place in the United States or within four leagues of the coast of the United States, without as well as within their respective districts, to examine the manifest and to inspect, search, and examine the vessel or vehicle, and every part thereof, and any person, trunk, or package on board, and to this end to hail and stop such vessel or vehicle, if under way, and use all necessary force to compel compliance, and if it shall

appear that any breach or violation of the laws of the United States has been committed, whereby or in consequence of which such vessel or vehicle, or the merchandise, or any part thereof, on board of or imported by such vessel or vehicle is liable to forfeiture, it shall be the duty of such officer to make seizure of the same, and to arrest, or, in case of escape or attempted escape, to pursue and arrest any person engaged in such breach or violation.

40 "Officers of the Department of Commerce and other persons authorized by such department may go on board of any vessel at any place in the United States or within four leagues of the coast of the United States and hail, stop, and board such vessels in the enforcement of the navigation laws and arrest, or, in case of escape or attempted escape, pursue and arrest any person engaged in the breach or violation of the navigation laws."—19 U. S. C. A., section 1581.

Moreover, this reenactment of section 581 of the Act of 1922 provides without qualification that officers of the customs may go on board any vessel at any time and at any place in the United States, or within four leagues of the coast thereof, "to inspect, search, and examine the vessel." As this provision of law contains no restriction on the right to board and search, and the enforcement of the navigation laws is a part of the regular duties of customs officers, it would seem that any attempt to prohibit the exercise of this authority for the purpose of enforcing the navigation laws would be judicial legislation.

The only possible restriction on the authority is the fourth and fifth amendments to the Constitution prohibiting unreasonable searches and seizures and securing a defendant in a criminal case from being compelled to be a witness against himself.

This, after all, is not a criminal proceeding but an action in rem. "Forfeiture under the Revised Statutes, § 4377, for breach of the navigation laws, is strictly in rem and is not dependent upon a preliminary adjudication of personal guilt." U. S. v. The Ruth Mildred, 286 U. S. 67.

The personnel of the Coast Guard has similar status with officers of the Customs service. Maul v. U. S., 274 U. S. 501.

41 In the case at bar the government officials had received a communication regarding these vessels and pursuant thereto they proceeded to them for the purpose of inspecting them. The vessels were American vessels enrolled or licensed for the coasting trade. They were tied together and moored at a dock in this district.

The officers, clothed with the authority given them under the statutes aforesaid, went aboard these vessels and found upon inspection the violations of the law.

There was nothing unreasonable in this action. This was no search through a man's home for the purpose of seizing his private papers, but a necessary inspection inherently an attribute of the sovereignty of the government.

In Boyd v. U. S., 116 U. S. 616, Mr. Justice Bradley used language which is of particular significance and applicability here. It was there said (p. 623):

"The search for and seizure of stolen or forfeited goods, or goods liable to duties and concealed to avoid the payment thereof are totally different things from a search for and seizure of a man's private books and papers for the purpose of obtaining information therein contained, or of using them as evidence against him, the two things differ toto coelo. In the one the Government is entitled to the possession of the property; in the other, it is not. The seizure of stolen goods is authorized by the common law; the seizure of goods forfeited for a breach of the revenue laws, or concealed to avoid the duties payable on them, has been authorized by English statutes for at least two centuries past; and like seizures have been authorized by our own revenue acts from the commencement of the Government. The first statute passed by Congress to regulate the collection of duties, Act of July 31, 1789, 1—Stat. 29, 43, contains provisions to this effect. As this Act was passed by the same
42 Congress which proposed for adoption the original amendments to the Constitution, *it is clear that the members of that body did not regard searches and seizures of this kind as 'unreasonable', and they are not embraced within the prohibition of the amendment.*"

Again in Carroll v. U. S., 267 U. S. 132 at page 153, Mr. Chief Justice Taft speaking for the Court says:

"We have made a somewhat extended reference to these statutes to show that the guarantee of freedom from unreasonable searches and seizures by the Fourth Amendment has been construed, practically since the beginning of the Government as recognizing a necessary difference between a search of a store, dwelling house, or other structure in respect of which a proper official warrant readily may be obtained, and a search of a ship, motorboat, wagon, or automobile where it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant may be sought.

"Having thus established the contraband goods concealed and illegally transported in an automobile or other vehicle may be searched for without a warrant, we come now to consider under what circumstances such search may be made. It would be intolerable and unreasonable if a prohibition agent were authorized to stop every automobile on the chance of finding liquor and thus subject all persons lawfully using the highways to the inconvenience and indignity of such a search. Travellers may be so stopped in crossing an international boundary because of national self-protection reasonably requiring one entering the country to identify himself as entitled to come in, and his belongings and effects which may be lawfully brought in."

Also, cited with approval in the Carroll case, on the question of probable cause: The Apollon 9, Wheat. 362, Mr. Justice Story, who delivered the judgment of the Court said (p. 374):

43 "It has been very justly observed at the bar that the Court is bound to take notice of public facts and geographical positions, and that this remote part of the country has been infested, at different periods, by smugglers, is matter of general notoriety, and may be gathered from the public documents of the Government."

So here this Court cannot shut its eyes to the highly convenient aspect of the New Jersey coast line as an attractive haven for those seeking to evade the laws prohibiting the landing of contraband alcohol.

If the contention prevails that Customs and Coast Guard officers may not exercise the authority conferred upon them by Section 581, Tariff Act of 1931, without having probable cause therefor or a search warrant, it will follow that the Coast Guard and Customs officers are precluded from making any inspection of American vessels for violation of any law. They may not then inspect vessels for the purpose of determining whether foreign goods are on board; or to demand, inspect, and verify manifests of vessels; or to inspect vessels to determine whether their documents are in order, have not expired, and are the documents which have been issued for the vessel boarded; or to inspect for violations of immigration laws; or to enforce provisions of Navigation Laws relative to equipment and radio; or to enforce provisions of Navigation and Passenger Laws which aim to prevent overcrowding, presence of faulty, unsatisfactory equipment on board; the operation of vessels by others than duly licensed officers; operation of unseaworthy vessels; violations of Seamen's Act, which provides for a certain percentage of American seamen on board.

If the Coast Guard and Customs officers are prevented from making thorough inspection of American vessels it will mean that

44 the smugglers of contraband, narcotics, liquor, stowaways, foreign merchandise, dutiable and free, prohibited importations, such as infected plants, fruits, etc., or owners of privateers, the masters of filibusters, need only maintain an outward air of respectability and legality to escape discovery, and it will surround them with and assure them of an immunity that was never intended.

It will mean a breaking down of the Tariff Laws upon which the Government depends for the revenue with which to maintain the functions of the Government and the credit of the United States.

If such power does not rest in the properly constituted authorities nothing can prevent a shipowner or charterer from storing dynamite, high explosives, etc., aboard his boat at Port Johnson, safe from the scrutiny of any officer charged by law to regulate such storage and traffic.

An American tug could bring the bubonic plague and other infectious diseases into the country and escape discovery.

To hold less would extend to privileged violators of the law an advantage over honest importers who pay their lawful customs duties and penalize legitimate shipowners who comply with the laws of the United States.

A large quantity of alcohol was found aboard the barge "Doris." Only insignificant quantities were found upon the other barge "Helen" and upon the motor oil screw "Evelyn." It is, however, apparent from the evidence that the "Doris" and "Helen", being without motive power, were towed by the "Evelyn."

All were licensed in the coasting trade.

Each of their documents provided as follows:

"License * * * Conrad Mathiason, the Master, having sworn that he is citizen of the United States and that this license
45 was not to be used for any other vessel or for any other employment as herein specified or in any trade or business whereby the revenue of the United States may be defrauded." (See foot of Consolidated Enrollment and License Certificate Exhibits G–1, G–2, and G–3.)

The transportation or the storage of the alcohol found thereon was in violation of their licenses. The presence of the alcohol on board was not defended or explained by the production of any evidence that the same was legally thereon.

In the case of "The Esther M. Rendle", 7 Fed. (2) 545, and 13 Fed. (2) 839, the Court said:

"Although the tug was licensed to engage in coastwise trade, its employment in illegal trade or traffic, whether coastwise or foreign, would subject it to forfeiture under R. S. § 4377, as being employed in trade other than that for which she is licensed." * * *

And in "The Dante", 17 Fed. (2) 304, the following appears:

"The opinions in the 'Esther M. Rendle', 13 Fed. (2) 839 (No. 1930, decided in the October Term, 1925, by the United States Circuit Court of Appeals, First Circuit), and also in The Underwriter (C. C. A.), 13 F. (2d) 433. The Resolution, Fed. Cas. No. 11,709; The Mars (C. C. Mass.), Fed. Cas. No. 15,723; United States v. One Black Horse (D. C.), 300 F. 584; Goldsmith Grant Company v. United States, 254 U. S. 505, 41 S. Ct. 189, 65 L. Ed. 376—cited on behalf of the government, are persuasive here that innocence or want of knowledge of the use to which the offending thing is put is beside the question. It is the illegal use which works the forfeiture prescribed by this and other such quasi-penal statutes; the innocence or guilt of the owner being accidental."

The action taken by the government officers against these
46 three boats was logical and legal. They had authority to board the boats and their search was not unreasonable. The result of such search warranted the seizure which they made. The court fails to find that the owner of the vessels was deprived of any constitutional rights by such reasonable search and hence it follows that all of the vessels should be forfeited and appropriate decrees may be taken accordingly.

In United States District Court

Decree of forfeiture

Filed May 29, 1933

The marshal having returned on the said monition duly issued to him in the above-entitled cause, that in obedience thereto he has attached the cargo of 146,157 gallons of alcohol seized on the oil barge "Doris" and has given due notice to all persons claiming the same that the Court would on the thirteenth day of November 1932 proceed with the condemnation thereof, and the usual proclamation having been made, and Frank Rizzo having interposed a claim and filed an answer to the said libel as the owner of the said cargo consisting of 146,157 gallons of alcohol, and the said libel action having been duly noticed for trial and the matter having been duly tried before the Honorable Phillip Forman, one of the Judges of this court, and a decision having been duly rendered by the Court on the fifth day of May 1933 condemning as forfeited the said 146,157 gallons of alcohol;

Now, on motion of Harlan Besson, United States Attorney, proctor for libellant, in support of said libel, and Harry H. Weinberger, appearing in opposition thereto, it is

47 Ordered, adjudged, sentenced, and decreed that the said 146,157 gallons of alcohol be, and the same hereby are, condemned as forfeited to the United States of America for violation of Section 4377 of the Revised Statutes of the United States, Section 325, Title 46, United States Code, and it is further

Ordered, adjudged, sentenced, and decreed that the United States Marshal for the District of New Jersey be, and he hereby is, authorized and directed to deliver the said 146,157 gallons of alcohol to the Coordinator of the Second Area as per requisition and affidavit which are hereto attached and made a part hereof, and that said marshal make due return to this Court of his proceedings under this decree.

FORMAN, *Judge.*

Dated May 27, 1933.

In United States District Court

Order to show cause why decree should not be modified and altered

Filed June 5, 1933

This matter being opened to the Court on the duly verified petition of Minturn & Weinberger, Esquires, proctors for the claimant, Frank Rizzo, and it appearing that a decree of forfeiture has heretofore been entered herein on the twenty-seventh day of May 1933 and filed in the clerk's office on the twenty-ninth day of May 1933, and it appearing that said decree should be modified and altered, as prayed

for in the said petition annexed hereto and made a part hereof, it is thereupon, on this fifth day of June 1933,

48 Ordered, that the libellant herein, by its proctor, Harlan Besson, Esquire, United States Attorney for the District of New Jersey, show cause before this Honorable Court on the ninth day of June 1933, at 10:30 o'clock in the morning, at the courthouse in the Post Office Building, Trenton, New Jersey, why the said decree should not be modified and altered as prayed for in said petition or in such other manner or form as to this Honorable Court may seem just and proper; and it is further

Ordered, that in the meantime the libellant herein be, and it hereby is, enjoined and restrained from in any wise executing the said decree or any part thereof; and it is further

Ordered, that a copy of this order, which may be certified a true copy by the proctors for the claimant, Frank Rizzo, be forthwith served upon the libellant by its proctor, Harlan Besson, Esquire, United States Attorney for the District of New Jersey, and also a copy thereof upon Philip F. Eltinge, Esquire, as Collector of Customs for the Port of New York, which said service may be effected by forthwith mailing a copy, certified a true copy by the attorneys for the petitioners.

FORMAN,
United States District Judge.

49 In United States District Court

Petition

Filed June 5, 1933

To the Honorable Judges of the United States District Court for the District of New Jersey:

The petition of Minturn & Weinberger, Esquires, proctors for the claimant, Frank Rizzo, respectfully shows that:

1. A libel was heretofore filed in the above-entitled cause and monition issued to the marshal, attaching the cargo, 146,157 gallons of alcohol.

2. Claimant, Frank Rizzo, interposed a sworn claim and filed an answer to the said libel, as owner of the said cargo, consisting of 146,157 gallons of alcohol.

3. The libel action was duly noticed for trial and the matter tried before the Honorable Phillip Forman, one of the Judges of this court, and a decision was rendered by the Court on May 5, 1933, condemning, as aforesaid, the 146,157 gallons of alcohol.

4. On May 27, 1933, a decree of forfeiture was entered by this Court, in which it was ordered, adjudged, sentenced, and decreed that the United States Marshal for the District of New Jersey deliver the said 146,157 gallons of alcohol to the Coordinator of the Second Area as per requisition and affidavit attached to and made a part of the said decree.

5. Said decree was filed with the clerk of the court on May 29, 1933, and a copy thereof was received by your petitioners through the mail on May 31, 1933.

50 6. Petitioners respectfully submit that said decree be modified and altered insofar as it orders and decrees the delivery of the said 146,157 gallons of alcohol to the Coordinator of the Second Area, and that in lieu of said order of delivery the said decree provide for a public sale of the said 146,157 gallons of alcohol, in conformance with law and the rules and regulations of this court.

7. Petitioners further submit that it is the intention of the said Frank Rizzo, claimant herein, and of petitioners on his behalf, to prosecute an appeal in the Circuit Court of Appeals for the Third Circuit, with immediate dispatch after entry of final decree in the modified and altered form herein prayed for.

Wherefore petitioners respectfully pray that the said decree be modified and altered as heretofore prayed for, or in such other manner and to such extent as to this Honorable Court may seem just and proper, and that pending the entry of a final decree in said modified and altered form execution on the decree heretofore entered be stayed.

MINTURN & WEINBERGER,
Proctors for Petitioners.

51 [*Duly sworn to by Wm. N. Margolis; jurat omitted in printing.*]

52 In United States District Court

Amended decree of forfeiture

Filed June 29, 1933

The marshal having returned on the said monition duly issued to him in the above-entitled cause, that in obedience thereto he has attached the cargo of 146,157 gallons of alcohol seized on the oil barge "Doris", and has given due notice to all persons claiming the same that the Court would on the thirteenth day of January 1933 proceed with the condemnation thereof; and the usual proclamation having been made, and Frank Rizzo having interposed a claim and filed an answer to the said libel as the owner of the said cargo, consisting of 146,157 gallons of alcohol, and the said libel action having been duly noticed for trial and the matter having been duly tried before the Honorable Phillip Forman, one of the Judges of this Court, and a decision having been duly rendered by the Court on the fifth day of May 1933 condemning as forfeited the said 146,157 gallons of alcohol;

Now, on motion of Harlan Besson, United States Attorney, proctor for libellant, in support of said libel, and Harry H. Weinberger appearing in opposition thereto, it is

Ordered, adjudged, and decreed that the said 146,157 gallons of alcohol be, and the same hereby are, condemned as forfeited to the United States of America for violation of Section 4377 of the Revised Statutes of the United States, Section 325, Title 46, United States Code; and it is further

Ordered, adjudged, and decreed that the said 146,157 gallons of alcohol be, and the same are hereby, ordered sold by the United
53 States Marshal for the District of New Jersey at public auction for the highest price, to a bidder authorized by law to purchase and receive alcohol, said sale to be subject to confirmation by the Court; and it is further

Ordered, adjudged, and decreed, that the proceeds of sale of said 146,157 gallons of alcohol be deposited in the registry of this court to be forfeited to the United States of America in the event that the decree heretofore entered herein and as amended becomes final by lapse of time within which appeal may be taken or be affirmed upon appeal in the event an appeal is taken, and that in the event the decree herein, as amended, shall be reversed on appeal and final judgment entered for the claimant of said 146,157 gallons of alcohol, then the said proceeds of sale so deposited as aforesaid in the registry of this court shall become the property of and be delivered to the said claimant; and it is further

Ordered, adjudged, and decreed, that said proceeds of sale so deposited in the registry of this court shall be substituted in the place and stead of said 146,157 gallons of alcohol, and that all further proceedings herein shall be against said proceeds of sale.

FORMAN, *Judge.*

JUNE 28, 1933.

54 In United States District Court

Notice of appeal

Filed June 29, 1933

SIR: Please take notice that the claimant, Frank Rizzo, hereby appeals to the United States Circuit Court of Appeals for the Third Circuit from the final decree signed by the Hon. Phillip Forman, one of the Judges of this court, and entered herein on the twenty-seventh day of May 1933, and that the claimant hereby appeals from each and every part of said decree as well as the whole thereof.

Dated Newark, N. J., June 9, 1933.

Yours, etc.,

MINTURN & WEINBERGER,
Proctors for Claimant.

To HARLAN BESSON, Esq.,
United States Attorney, District of New Jersey,
Post Office Building, Trenton, New Jersey,
Proctor for Libellant.

The appeal herein is hereby allowed.

FORMAN, *U. S. D. J.*

JUNE 28, 1933.

55 In United States District Court

Order allowing appeal

Filed June 29, 1933

The claimant, Frank Rizzo, in the above-named libel, feeling aggrieved by the final decree entered herein on the twenty-eighth day of June 1933 does hereby appeal from the said final decree as amended, to the United States Court of Appeals for the Third Circuit, and prays that this appeal may be allowed.

And now, on this twenty-eighth day of June 1933, it is ordered that the appeal be allowed as prayed for; and

It is further ordered that pending the said appeal from the said final decree as amended that the proceeds of sale, as ordered, adjudged, and decreed by the said amended decree, be deposited and held in the registry of this court and substitute in the place and stead of the 146,157 gallons of alcohol mentioned and described in said amended decree, and that all further proceedings herein shall be against said proceeds of sale deposited in the registry of this court, subject to the disposition thereof by the United States Circuit Court of Appeals for the Third Circuit.

FORMAN, *Judge.*

56 In United States District Court

Assignments of error

Filed June 29, 1933

And now comes Frank Rizzo, the claimant by Harry H. Weinberger, his attorney, and says that in the record, proceedings, and judgment in the above-stated cause there is manifest error in the following, to wit:

1. The Court erred in decreeing forfeiture of the 146,157 gallons of alcohol.

2. The Court erred in finding that Frank Rizzo was not the true and bona fide owner of the said alcohol.

3. The Court erred in finding that the said Frank Rizzo had not proven his status as claimant with a right to appear and defend in the said libel proceedings.

4. The Court erred in admitting evidence of the statement made by the said claimant at the time of his arrest to the effect that he was a watchman.

5. The Court erred in failing to dismiss the libel proceedings on the ground that the libellant gained custody and control of the said alcohol by reason of an illegal search and seizure effected by a Federal officer.

6. The Court erred in refusing to believe the testimony of the said Frank Rizzo in the absence of contradictory testimony introduced by the libellant.

7. The Court erred in failing to dismiss the exceptions to the claim of Frank Rizzo filed by the libellant.

57 8. The Court erred in failing to dismiss the exceptions to the claim of the said Frank Rizzo after the proof offered in support of such exceptions had been taken.

9. The Court erred in failing to dismiss the exceptions to the claim of Frank Rizzo after the testimony of the said Frank Rizzo and his witnesses was taken.

10. The Court erred in decreeing forfeiture of the said cargo without proof on the part of the libellant that the said search and seizure was legal and not in violation of the constitutional rights of the said Frank Rizzo who was at the time of the said search and seizure the sole person in control and custody of the said cargo.

11. The Court erred in finding that the said Frank Rizzo is unworthy of belief by reason among others of the fact that he is an "underworld operator" and a confessed "professional gambler and a liar."

12. The Court erred in decreeing forfeiture of the cargo on each and every cause enumerated in said libel.

13. The Court erred in requiring the claimant to affirmatively prove title to the cargo.

14. The Court erred in decreeing forfeiture of the cargo on the libel which is insufficient on its face to spell out a cause for forfeiture in that it fails to allege a lawful seizure of the said cargo.

15. The Court erred in failing to dismiss the libel on the ground that there was no proof that the said cargo was imported into the United States.

16. The Court erred in finding that there was probable cause sustaining the libel.

58 17. The Court erred in permitting into testimony over the objection of counsel of the claimant, the conversation between claimant and the customs officer, Pernisco.

18. The Court erred in decreeing forfeiture under the first cause set forth in the libel on the ground that the vessels in question being of American registry and not bound to the United States from a foreign port, were not required to carry a manifest.

19. The Court erred in decreeing forfeiture in that the libellant failed to prove that the vessels in question were such as under the law were required to carry manifests.

20. The Court erred in decreeing forfeiture in the absence of proof that the cargo of alcohol was imported into the United States.

21. The Court erred in failing to dismiss the libel and to restore the cargo to the said Frank Rizzo as claimant thereof.

22. The Court erred in decreeing forfeiture under the fourth cause of forfeiture on the ground that there was no proof of any transportation.

23. The Court erred in decreeing forfeiture of the said vessels in that there was no proof offered by the libellant that the said vessels or any of them was employed in trade for which it was not licensed.

24. The Court erred in entering decrees for forfeiture in that there was no proof offered on behalf of the libellant that the said vessels or any of them were employed in trade.

MINTURN & WEINBERGER,
Proctors for Claimant.

Office and P. O. Address, 60 Park Place, Newark, N. J.

59 In United States District Court for the District of New Jersey

A–7811

UNITED STATES OF AMERICA, LIBELLANT

v.

OIL BARGE "HELEN", HER ENGINES, ETC.

A–7813

UNITED STATES OF AMERICA, LIBELLANT

v.

MOTOR OIL SCREW "EVELYN", HER ENGINES, ETC.

A–7814

UNITED STATES OF AMERICA, LIBELLANT

v.

146,157 GALLONS OF ALCOHOL

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60 A–7815

UNITED STATES OF AMERICA, LIBELLANT

v.

OIL BARGE "DORIS", HER ENGINES, ETC.

Order consolidating causes

Filed July 17, 1933

On motion of the proctors of the above-entitled causes, it is by the Court ordered that said causes, No. A–7811, No. A–7813, No. A–7814,

and No. A–7815, respectively, be, and the same are hereby, consolidated and to be tried as one case in the United States Circuit Court of Appeals for the Third Circuit.

FORMAN,
United States District Judge.

Assented to:

HARLAN BESSON,
United States Attorney, Proctor for Libellant.
MINTURN & WINBERGER,
Proctors for Claimant, Frank Rizzo.
KESSLER & KESSLER,
Proctors for Claimant, Matoil Service and Transport Company.

61 In United States District Court For the District of New Jersey

[Titles omitted.]

No. A–7814. On Libel, &c.

No. A–7813. On Libel, &c.

No. 7815–A. On Libel, &c.

No. A–7811. On Libel, &c.

Stipulation as to exhibits

Filed August 8, 1933

62 It is hereby stipulated by and between Harlan Besson, Esquire, United States Attorney for the District of New Jersey, proctor for the libellant in the above-entitled proceedings, and Kessler & Kessler, Esquires, proctors for the claimant, Matoil Service & Transport Company, and Minturn & Weinberger, Esquires, proctors for the claimant, Frank Rizzo, that the exhibits heretofore introduced in evidence in the above-entitled cause, as part of the record in the above cases, with a brief description of the exhibits and the numbers given to them upon their introduction into evidence, are as follows:

G–1, G–2, G–3

Enrollment and license issued by the Customs authorities of the United States Government, which were taken from the American

Motor Oil Screw "Evelyn", and which were the enrollment papers for the three vessels which are the subject of the libel proceedings above set forth.

G–5, G–6, G–7, G–8

Samples of alcohol taken from the three boats, and which alcohol contains more than one-half of 1 per cent. by volume.

63

C–1, C–2, C–3

Bills of sale issued by the United Dry Dock Company to the Matoil Service and Transport Company for the American Motor Oil Screw "Evelyn", the Oil Barge "Doris", and the Oil Barge "Helen."

C–4

Contract for the building of the two oil barges "Doris" and "Evelyn", which contract is dated July 6, 1932, and entered into between the United Dry Dock Company and Matoil Service and Transport Company.

C–5

Contract for the building of the Motor Oil Screw "Evelyn", dated July 1, 1932, and entered into between United Dry Dock Company and the Matoil Service and Transport Company.

C–6, C–7

Two bonds issued by the United States Guarantee Company as surety, and United Dry Docks, Inc., as principal to the Matoil Service and Transport Company, which bonds are executed for the performance of the conditions of the contract for the building of the boats above referred to.

C–8, C–9, C–10

Papers representing the charter of the three boats from the Matoil Service and Transport Company to the Rogers Oil and Supply Company stating the terms and conditions under which the boats
64 are chartered to the said Rogers Oil and Supply Company, and the amount to be paid each month therefore.

C–11

Certificate of the incorporation of the Matoil Oil Service and Transport Company, a corporation of the State of Delaware.

C–12

Report of Mr. Hughes as to the examination and progress of the boats being built by the United Dry Dock Company for the Matoil Service and Transport Company.

C–13

Enrollment license for the American Motor Oil Screw "Evelyn" issued by the customhouse authorities of the United States Government.

C–14

Enrollment license for the American Motor Oil Screw "Evelyn" issued by the customhouse authorities of the United States Government to the Matoil Service and Transport Company.

C–15

Enrollment license for Oil Barge "Helen" issued by the customhouse authorities of the United States Government to the Matoil Service and Transport Company.

C–16

Verified claim of Frank Rizzo, claimant in the above action, known as A–7814.

C–17

Card received by Frank Rizzo, the claimant herein, from Mr.
65 Rogers, of the Rogers Oil and Supply Company, showing the business address of the said Rogers Oil and Supply Company.

C–18, C–19, C–20

Duplicates of original documents already introduced in the above causes and numbered C–8, C–9, and C–10.

HARLAN BESSON,
United States Attorney,
Proctor for Libellant.

SAMUEL KESSLER,
Proctor for Matoil Service & Transport Co.

MINTURN & WEINBERGER,
Proctors for Frank Rizzo, Claimant.

66 In United States District Court

Stipulation as to use of exhibits on appeal

Filed August 8, 1933

It is stipulated and agreed between the proctors and advocates of the above-named causes that the original exhibits used at the final hearing in the above-named causes, which were jointly tried, with the exception of the samples of alcohol which may be produced if required by the Court, shall be produced before the Circuit Court of Appeals for the Third Circuit at the final argument on appeal of these cases, and may be used by the Judges of the Circuit Court of Appeals in arriving at their determination thereof, and that the exhibits contemplated by this stipulation are the exhibits heretofore referred to in the stipulation specifying said exhibits previously filed with the clerk of the United States District Court in these causes, and which said last mentioned stipulation will be embodied in the printed record on appeal, together with this stipulation.

Dated August 8, 1933.

HARLAN BESSON,
United States Attorney,
Proctor for U. S., Libellant.
MINTURN & WEINBERGER,
Proctors for Frank Rizzo, Claimant.
SAMUEL KESSLER,
Proctor for Matoil Service & Transport Co., Inc.

67 In United States District Court for the District of New Jersey

No. A–7811

UNITED STATES OF AMERICA

v.

OIL BARGE "HELEN"

Harlan Besson, United States Attorney, Trenton, N. J., proctor for libellant.

Kessler & Kessler, 9 Clinton Street, Newark, N. J., and Minturn & Weinberger, 60 Park Place, Newark, N. J., proctors for claimant.

Docket entries

Dec. 22, 1932. Libel for forfeiture.
Dec. 22, 1932. Monition issued retble Jan. 13.

Dec. 28, 1932. Notice of claim.
Dec. 28, 1932. Exceptive allegations to claim.
Dec. 28, 1932. Answer & Exceptions.
Dec. 30, 1932. Stipulation for costs.
Dec. 30, 1932. Monition returned served.
Dec. 30, 1932. Hearing—J. Forman.
Dec. 30, 1932. Amendment to Libel.
Jan. 3, 1933. Exceptions to answer.
Jan. 20, 1933. Hearing adjourned to Jan. 27.
68 Mar. 2, 1933. Memorandum of Court J. Forman filed in 7814.
Mar. 30, 1933. Hearing before J. Forman; see 7810.
May 9, 1933. Memorandum of Court filed in 7814.
May 29, 1933. Final decree.
June 29, 1933. Amended final decree.
June 29, 1933. Notice of appeal & all other appeal papers filed in 7813.
July 17, 1933. Order for consolidation of trial in appellate Court filed in 7814.
Aug. 1, 1933. Vend Exp. issued retble Aug. 25.

69 In United States District Court for the District of New Jersey

Libel

Filed December 22, 1932

To the Honorable the Judges of the United States District Court for the District of New Jersey:

The libel of information of the United States of America by its proctor, Harlan Besson, United States Attorney for the District of New Jersey (by Isador S. Worth, Assistant United States Attorney) against Oil Barge "Helen", her engines, boats, boilers, tackle, apparel, and furniture, in a cause of forfeiture, civil and maritime for breach of provisions of Section 584, Paragraph 814, Section 594, of the Tariff Act of 1930, and Section 4377 of the Revised Statutes of the United States, upon information and belief alleges as follows:

FOR A FIRST CAUSE OF FORFEITURE

1. That at all times hereinafter mentioned libellant was and still is a corporation sovereign.

2. That the Oil Barge "Helen" is an American licensed vessel.

3. That on or about the 12th day of December 1932, prior to the filing of this libel, the said Oil Barge "Helen" was within the admiralty and maritime jurisdiction of the United States of America and within the Federal District of New Jersey, to wit, at the Central Railroad Dock, at Port Johnson, Bayonne, in the District of New Jersey, and was on the date aforesaid lawfully boarded and searched by members of the United States Customs Service.

70 4. That on or about the said time the said Oil Barge "Helen" was seized by officers of the United States Coast Guard as forfeited to the United States for violation of the provisions hereinabove set forth, and that the said vessel has remained and still is in the possession and custody of the Collector of Customs of the Port of New York as forfeited to the United States.

5. That demand was made of the Master and/or the person in charge of said vessel by an officer of the United States, lawfully entitled so to do, for the production of the manifest of the said vessel and that the said manifest was not produced in accordance with said demand and thereupon the said Master or person in charge of said vessel became liable to a penalty of five hundred dollars and the vessel became subject to forfeiture in accordance with Section 584 of the Tariff Act of 1930.

6. That on said date there was found on board said boat three gallons of alcohol, which said merchandise was not included or described in the manifest of said vessel, and which said merchandise was of the value of $16.05.

7. By reason thereof and in accordance with section 584 of the Tariff Act of 1930, the said vessel became subject to forfeiture and may be libelled therefor in any United States Court.

FOR A SECOND CAUSE OF FORFEITURE

8. The allegations contained in paragraphs 1, 2, 3, and 4 of the first cause of forfeiture are here repeated.

9. That the merchandise described in the paragraphs hereinabove referred to contained more than one-half of one per centum of
71 alcohol and had been imported into the United States without proper permit for same having been issued as provided for by law.

10. That by reason thereof and under the provisions of paragraph 814 of the Tariff Act of 1930, the said Oil Barge "Helen" became subject to forfeiture and may be libelled therefor in any United States Court.

FOR A THIRD CAUSE OF FORFEITURE

11. The allegations contained in paragraphs 1, 2, 3, and 4 of the first cause of forfeiture are here repeated.

12. That on or about the 12th day of December 1932, there was unladened, transshipped to, placed in and received in the said vessel three gallons of alcohol all of the value of $16.05 and in violation of the provisions of Section 584 and paragraph 814 of the Tariff Act of 1930, therefore the Master of the said vessel and any person aiding or assisting thereon became liable to the penalty equal to twice the value of said merchandise, to wit: $32.10 and the said Oil Barge "Helen" became subject to forfeiture in any United States Court.

13. That by all of which as aforesaid the said Oil Barge "Helen" became liable in accordance with Section 594 of the Tariff Act of

1930, to be seized and proceeded against summarily by libel to recover the penalties hereinabove set out and that the said Oil Barge "Helen" is subject to forfeiture and may be libelled therefor in any United States Court.

FOR A FOURTH CAUSE OF FORFEITURE

14. The allegations contained in paragraphs 1, 2, 3, and 4 of the first cause of forfeiture are here repeated.

72 15. That on or about the 12th day of December 1932, the said Oil Barge "Helen" was employed in a trade other than that for which she was licensed, to wit, the transportation of intoxicating liquor within the territorial waters of the United States, to wit, at Port Johnson, Bayonne, in the District of New Jersey.

16. That the trade of transporting intoxicating liquor in the territorial waters of the United States in the District of New Jersey on December 12, 1932, in which trade said vessel was engaged was an illicit trade.

17. That by reason of the premises said ——— ——— became and is subject to seizure and forfeiture by the United States pursuant to the provisions of Section 4377 of the Revised Statutes of the United States and may be libelled therefor in any United States Court.

Wherefore, libellant prays that process in due form of law according to the course and practice of this Honorable Court in causes of admiralty and maritime jurisdiction may issue against the said Oil Barge "Helen" her engines, boats, boilers, tackle, apparel, and furniture, and that all persons, claiming any right, title, or interest therein may be cited to appear and answer on oath all and singular the matter aforesaid, and that the libellant may have such other and further relief as in law and justice it may be entitled to recover.

HARLAN BESSON,
United States Attorney, District of New Jersey.
By ISADOR S. WORTH,
Asst. United States Attorney.

Dated December 21, 1932.

73 In United States District Court

Monition

Filed December 30, 1932

The President of the United States of America, to the marshal of the District of New Jersey, Greeting:

Whereas a Libel was filed in the District Court of the United States for the District of New Jersey on the 22nd day of December, in the year of our Lord one thousand nine hundred and thirty-two, by United States of America against Oil Barge "Helen", her engines, boilers, boats; machinery, tackle, apparel, furniture, etc., in a cause

of forfeiture, civil and maritime, for the reasons and causes in the said Libel mentioned, and praying the usual process and monition of the said Court in that behalf to be made, and that all persons interested in the said Oil Barge "Helen", or vessel, her engines, boilers, tackle, etc., may be cited in general and special to answer the premises and all proceedings being had, that the said Oil Barge "Helen", or vessel, her engines, boilers, tackle, etc., may, for the causes in the said Libel mentioned, be condemned and sold to pay the demands of the Libellant.

You are therefore hereby commanded to attach the said Oil Barge "Helen", or vessel, her engines, boilers, tackle, etc., and to detain the same in your custody until the further order of the Court respecting the same, and to give due notice to all persons claiming
74 the same, or knowing or having anything to say why the same should not be condemned and sold pursuant to the prayer of the said Libel, that they be and appear before the said Court to be held at Trenton, in and for the District of New Jersey, on the 13th day of January 1933 at ten o'clock in the forenoon of the same day if the same shall be a day of jurisdiction, otherwise on the next day of jurisdiction thereafter, then and there to interpose a claim for the same, and to make their allegations in that behalf. And what you shall have done in the premises do you then and there make return thereof, together with this Writ.

Witness the Honorable William Clark, Judge of said Court, at the City of Trenton, in the District of New Jersey, this 22nd day of December, in the year of our Lord one thousand nine hundred and thirty-two.

[SEAL]

GEORGE T. CRANMER,
Per ROSE O. MCCULLOUGH,
Deputy.

75

NOTICE

In obedience to the within monition, I attached the Oil Barge "Helen", therein described, on the 24th day of December 1932, and have given due notice to all persons claiming the same that this Court will, on the 13th day of January 1933 (if that day shall be a day of jurisdiction, if not, on the next day of jurisdiction thereafter) proceed to the trial and condemnation thereof, should no claim be interposed for the same.

F. C. SCHNEIDER,
U. S. Marshal.
By EDWARD W. VAN DUYNE, JR.,
Deputy.

Dated December 24, 1932.

Served copy of Monition on John Due, U. S. Customs Guard in charge, at Port Newark, on the 24th day of December 1932.

76 In United States District Court For the District of New Jersey

A–7811

On Libel for Condemnation

UNITED STATES OF AMERICA, LIBELLANT

v.

OIL BARGE "HELEN", HER ENGINES, ETC., MATOIL SERVICE & TRANSPORT CO., INC., claimant

Exceptive allegations to claim

Filed December 28, 1932

The libellant above named hereby excepts to the claim of Matoil Service & Transport Co., Inc., claimant in this cause, as follows:

1. That the said claimant failed to allege that the said Matoil Service & Transport Company, Inc., is the true and bona fide owner of the said oil barge "Helen", or that any other person is the true and bona fide owner thereof.

2. That the claimant, Matoil Service & Transport Co., Inc., failed to allege that the said Samuel I. Kessler, named as attorney therein, is duly authorized to make said claim by the said Matoil Service & Transport Co., Inc.

77 3. That the said Samuel I. Kessler is not duly authorized to file the claim herein on behalf of the said alleged owner, Matoil Service & Transport Co., Inc.

4. That the said claimant has failed to file stipulation for costs, as prescribed by the rules of admiralty, in the United States Supreme Court and in the United States District Court in and for the District of New Jersey.

HARLAN BESSON,
United States Attorney.

Dated December 28, 1932.

In United States District Court

Answer and exceptions

Filed December 28, 1932

The claimant herein, by Samuel I. Kessler, its attorney, for its answer to the libel herein alleges as follows upon information and belief:

First. Denies all and several the allegations contained in paragraphs marked "Second", "Third", "Fourth", "Fifth", "Sixth",

"Seventh", "Ninth", "Tenth", "Twelfth", "Thirteenth", "Fifteenth", "Sixteenth", and "Seventeenth" of said libel.

Second. Claimant repeats and realleges all the admissions and denials heretofore made in answer to paragraphs marked "Eighth", "Eleventh", and "Fourteenth" of said libel.

As and for a separate, distinct, and affirmative defense and by way of exceptive allegations the claimant herein alleges as follows:

Third. That the search and seizure as alleged in the libel by
78 the United States Coast Guard officials and/or such other officials of the United States of America was without legal right and without warrant in law and in violation of the rights of the claimant herein under the Fourth and Fifth Amendments of the Constitution of the United States of America.

Wherefore claimant prays that the libel herein be dismissed, and for such other and further relief as to this Honorable Court may seem just and proper.

SAMUEL I. KESSLER,
Attorney for Claimant,
9 Clinton Street, Newark, N. J.

[*Duly sworn to by Samuel I. Kessler, jurat omitted in printing.*]

79 In United States District Court for the District of New Jersey

UNITED STATES OF AMERICA, LIBELLANT

against

OIL BARGE "HELEN", HER ENGINES, ETC., MATOIL SERVICE & Transport Co., Inc., Claimant

Notice of claim

Filed December 28, 1932

And now Matoil Service & Transport Co., Inc., a Delaware corporation, intervening as owner of the above-described vessel, by its attorney, Samuel I. Kessler, appears before this Honorable Court and makes claim to the same as it is attached by the marshal under process of this Court, at the instance of the United States of America, and the said Samuel I. Kessler avers that at the time of the attachment thereof the Matoil Service & Transport Co., Inc., was and is the true and bona fide owner of the said cargo, and that no other person or corporation is the lawful owner thereof.

Wherefore, he prays that the said Matoil Service & Transport Co., Inc., be permitted to appear and defend accordingly.

MATOIL SERVICE & TRANSPORT CO., INC.,
By SAML. I. KESSLER, *Attorney.*

Dated Newark, December 27, 1932.

80 [*Duly sworn to by Samuel I. Kessler; jurat omitted in printing.*]

In United States District Court

Amendment to libel

Filed December 30, 1932

Now comes the libellant, the United States of America, by leave of the Court first had and obtained, to amend the libel heretofore filed in the above-entitled cause, by inserting the following paragraphs in the place and stead of the fifteenth and sixteenth paragraphs of the Fourth Cause of Forfeiture:

81 15. That on the 12th day of December 1932, and during all of the time of the occurrences mentioned and described in this cause of forfeiture, the said Oil Barge "Helen" was enrolled and licensed to carry on the coasting trade pursuant to the laws of the United States of America; that on the 12th day of December 1932, aforesaid, at Port Johnson, Bayonne, in the State of New Jersey, in the District of New Jersey, and within the jurisdiction of this Court, the said Oil Barge "Helen" was employed in a trade for which she was not licensed, in that she was unlawfully transporting and unlawfully possessing in transportation a large quantity of intoxicating liquor fit for use for beverage purposes and containing one-half of one percent or more of alcohol by volume, to wit, Three Gallons of alcohol, in violation of the provisions of Section 3, Title II, of the National Prohibition Act.

16. That by reason of the premises the said Oil Barge "Helen" became and is subject to seizure and forfeiture by the United States of America pursuant to the provisions of Section 4377 of the Revised Statutes of the United States of America, also known as "Section 325, Title 45, United States Code Annotated."

HARLAN BESSON,
United States Attorney.

Dated December 28, 1932.

On this day of December 1932 I allow the within amendment to the libel in this cause and direct that the clerk file the same.

Judge.

82 In United States District Court

Exceptions to answer

Filed January 3, 1933

The libellant, reserving its right to press its exceptions to the claim filed by the claimant in the above-named cause and without waving any of its rights acquired by the filing of such exceptions, hereby

excepts to the answer filed by the claimant in the above-named cause for the following reasons:

1. Because said answer is not verified as prescribed by the rules in admiralty of the United States Supreme Court.

HARLAN BESSON,
United States Attorney.

Dated January 3, 1933.

83 In United States District Court

Final decree.

Filed May 29, 1933

The Marshal having returned on the said monition duly issued to him in the above-entitled cause, that in obedience thereto he has attached the said Oil Barge "Helen", and her tackle, apparel, furniture, papers, engines, and boats and has given due notice to all persons claiming the same that the Court would on the thirteenth day of November 1932 proceed with the condemnation thereof and the usual proclamation having been made, and the Matoil Service and Transport Company, Inc., having interposed a claim and filed an answer to the said libel as the owner of the said Oil Barge "Helen" and her tackle, apparel, furniture, papers, engines, and boats, and the said libel action having been duly noticed for trial and the matter having been duly tried before the Honorable Phillip Forman, one of the Judges of this court, and a decision having been duly rendered by the Court on the fifth day of May 1933 condemning as forfeited the Oil Barge "Helen" and her tackle, apparel, furniture, papers, and engines.

Now, on motion of Harlan Besson, United States Attorney, proctor for libellant, in support of said libel and Samuel I. Kessler, appearing in opposition thereto, it is

Ordered, adjudged, sentenced, and decreed that the said Oil Barge "Helen" and her engines, tackle, apparel, furniture, boats, and papers be, and the same hereby are, condemned as forfeited to the United States for violation of the provisions of Section 4377 of the Revised Statutes of the United States (§ 325, Title 46, U. S. C.), as in the amended libel, filed herein, set forth, and it is further

84 Ordered, adjudged, sentenced, and decreed that the Marshal do sell the said vessel and her tackle, etc., upon six days' notice of sale, and that he pay the proceeds of such sale to the clerk of this court, at a session to be holden on the twenty-third day of June 1933, and that a writ of venditioni exponas issue accordingly.

FORMAN,
Judge.

Dated May 23, 1933.

85 In United States District Court

Amended final decree

Filed June 29, 1933

The Marshal having returned on the said monition duly issued to him in the above-entitled cause that in obedience thereto he has attached the said Oil Barge "Helen" and her tackle, apparel, furniture, papers, engines, and boats, and has given due notice to all persons claiming the same that the Court would, on the thirteenth day of January 1933, proceed with the condemnation thereof, and the usual proclamation having been made, and the Matoil Service and Transport Company, Inc., having interposed a claim and filed an answer to the said libel as the owner of the said Oil Barge "Helen" and her tackle, apparel, furniture, papers, engines, and boats, and the said libel action having been duly noticed for trial, and the matter having been duly tried before the Honorable Phillip Forman, one of the Judges of this court, and a decision having been duly rendered by the Court on the fifth day of May 1933 condemning as forfeited the Oil Barge "Helen" and her tackle, apparel, furniture, papers, and engines.

Now, on motion of Harlan Besson, United States Attorney, proctor for libellant, in support of said libel, and Samuel I. Kessler, appearing in opposition thereto, it is

Ordered, Adjudged, and Decreed that the said Oil Barge "Helen" and her engines, tackle, apparel, furniture, boats, and papers be, and the same hereby are, condemned as forfeited to the United States for violation of the provisions of Section 4377 of the Revised Statutes of the United States (par. 325, Title 46, U. S. C.), as in the amended libel, filed herein, set forth; and it is further

86 Ordered, Adjudged, and Decreed that the Marshal do sell the said vessel and her tackle, etc., upon six days' notice of sale, and that he pay the proceeds of such sale to the clerk of this court at a session to be holden on the twenty-fifth day of August 1933, and that a writ of venditioni exponas issue accordingly; and it is further

Ordered, Adjudged, and Decreed that the proceeds of sale of said vessel be deposited in the registry of this Court, to be forfeited to the United States of America in the event that the decree heretofore entered herein and as amended becomes final by lapse of time within which appeal may be taken, or be affirmed upon appeal in the event an appeal is taken; and that in the event the decree herein as amended shall be reversed on appeal and final judgment entered for the claimant of said vessel, then the said proceeds of sale so deposited as aforesaid in the registry of this court shall become the property of and be delivered to the said claimant; and it is further

Ordered, Adjudged, and Decreed that the said proceeds of sale so deposited in the registry of this court shall be substituted in the place and stead of said vessel, and that all further proceedings herein shall be against said proceeds of sale.

FORMAN, *Judge.*

June 28, 1933.

87 In United States District Court for the District of New Jersey

A–7815

UNITED STATES OF AMERICA, LIBELLANT

v against

OIL BARGE "DORIS"

Harlan Besson, U. S. Attorney, Trenton, N. J., proctor for libellant; Kessler & Kessler, 9 Clinton St., Newark, N. J., proctor for claimant.

Docket entries

Dec. 22, 1932. Libel for forfeiture.
Dec. 22, 1932. Monition issued retble. Jan. 13.
Dec. 28, 1932. Answer & Exceptions.
Dec. 28, 1932. Notice of claim.
Dec. 28, 1932. Exceptive allegations to claim.
Dec. 30, 1932. Amendment to libel.
Dec. 30, 1932. Monition returned served.
Dec. 30, 1932. Hearing—J. Forman.
Dec. 30, 1932. Stipulation for costs.
Jan. 6, 1933. Exceptions to answer.
Jan. 27, 1933. Hearing on exceptions adjourned to Jan. 27.
88 Mar. 22, 1933. Memo of Court J. Forman fld. in 7814.
Mar. 30, 1933. Hearing before J. Forman, see 7810.
May 9, 1933. Memorandum of Court filed in 7814.
May 29, 1933. Final Decree.
June 29, 1933. Amended final decree.
June 29, 1933. Notice of appeal & other appeal papers filed in 7813.
July 17, 1933. Order for consolidation for trial in appellate Court filed in 7814.
Aug. 2, 1933. Order extending time of sale.

89 In United States District Court for the District of New Jersey

Libel

Filed December 22, 1932

To the Honorable the Judges of the United States District Court for the District of New Jersey:

The libel of information of the United States of America by its proctor, Harlan Besson, United States Attorney for the District of New Jersey (by Isador S. Worth, Assistant United States Attorney) against the Oil Barge "Doris", her engines, boats, boilers, tackle, apparel, and furniture, in a cause of forfeiture, civil and maritime, for breach of provisions of Section 584, Paragraph 814, Section 594 of the Tariff Act of 1930 and Section 4377 of the Revised Statutes of the United States, upon information and belief alleges as follows:

FOR A FIRST CAUSE OF FORFEITURE

1. That at all times hereinafter mentioned libellant was and still is a corporation sovereign.

2. That the Oil Barge "Doris" is an American licensed vessel.

3. That on or about the 12th day of December 1932, prior to the filing of this libel the said Oil Barge "Doris" was within the admiralty and maritime jurisdiction of the United States of
90 America and within the Federal District of New Jersey, to wit, at the Central Railroad Dock, at Port Johnson, Bayonne, in the District of New Jersey, and was on the day aforesaid lawfully boarded and searched by members of the United States Customs Service.

4. That on or about the said time, the said Oil Barge "Doris" was seized by officers of the United States Coast Guard as forfeited to the United States for violation of the provisions hereinabove set forth, and that the said vessel has remained and still is in the possession and custody of the Collector of Customs of the Port of New York as forfeited to the United States.

5. That demand was made of the Master and/or the person in charge of said vessel by an officer of the United States, lawfully entitled so to do, for the production of the manifest of the said vessel and that the said manifest was not produced in accordance with said demand and thereupon said Master or person in charge of said vessel became liable to a penalty of five hundred dollars and the vessel became subject to forfeiture in accordance with Section 584 of the Tariff Act of 1930.

6. That on said date there was found on board said boat 146,157 gallons of alcohol which said merchandise was not included or described in the manifest of said vessel and which said merchandise was of the value of $781,939.95.

7. By reason thereof and in accordance with section 584 of the Tariff Act of 1930, the said Oil Barge "Doris" became subject to forfeiture and may be libelled therefor in any United States Court.

91 FOR A SECOND CAUSE OF FORFEITURE

8. The allegations contained in paragraphs 1, 2, 3, and 4 of the first cause of forfeiture are here repeated.

9. That the merchandise described in the paragraphs hereinabove referred to contained more than one-half of one per centum of alcohol and had been imported into the United States without proper permit for same having been issued as provided for by law.

10. That by reason thereof and under the provisions of paragraph 814 of the Tariff Act of 1930, the said Oil Barge "Doris" became subject to forfeiture and may be libelled therefor in any United States Court.

FOR A THIRD CAUSE OF FORFEITURE

11. The allegations contained in paragraphs 1, 2, 3, and 4 of the first cause of forfeiture are here repeated.

12. That on or about the 12th day of December 1932 there was unladened, transshipped to, placed in and received in the said vessel 146,157 gallons of alcohol, all of the value of $781,939.95, and in violation of the provisions of Section 584 and Section 814 of the Tariff Act of 1930; therefore, the Master of the said vessel and any person aiding or assisting thereon became liable to the penalty equal to twice the value of said merchandise, to wit: $1,563,879.90, and the said Oil Barge "Doris" became subject to forfeiture in any United States Court.

13. That by all of which, as aforesaid, the said Oil Barge
92 "Doris" became liable in accordance with Section 594 of the Tariff Act of 1930, to be seized and proceeded against summarily by libel to recover the penalties hereinabove set out, and that the said Oil Barge "Doris" is subject to forfeiture and may be libelled therefor in any United States Court.

FOR A FOURTH CAUSE OF FORFEITURE

14. The allegations contained in paragraphs 1, 2, 3, and 4 of the first cause of forfeiture are here repeated.

15. That on or about the 12th day of December 1932 the said Oil Barge "Doris" was employed in a trade other than that for which she was licensed, to wit, the transportation of intoxicating liquor within the territorial waters of the United States, to wit, at Port Johnson, Bayonne, in the District of New Jersey.

16. That the trade of transporting intoxicating liquor in the territorial waters of the United States, in the District of New Jersey, on December 12, 1932, in which trade said vessel was engaged, was an illicit trade.

17. That by reason of the premises said vessel became and is subject to seizure and forfeiture by the United States pursuant to the provisions of Section 4377 of the Revised Statutes of the United States and may be libelled therefor in any United States Court.

Wherefore, libellant prays that process in due form of law according to the course and practice of this Honorable Court in causes of admiralty and maritime jurisdiction may issue against the said Oil Barge "Doris" her engines, boats, boilers, tackle, apparel, and furniture, and that all persons claiming any right, title, or interest
93 therein may be cited to appear and answer on oath all and singular the matter aforesaid, and that the libellant may have such other and further relief as in law and justice it may be entitled to recover.

HARLAN BESSON,
United States Attorney, District of New Jersey.
By ISADOR S. WORTH,
Asst. United States Attorney.

Dated December 21, 1932.

In United States District Court

Monition

Filed December 30, 1932

The President of the United States of America,
To the Marshal of the District of New Jersey, Greeting:

Whereas a Libel was filed in the District Court of the United States for the District of New Jersey on the 22d day of December, in the year of our Lord one thousand nine hundred and thirty-two, by United States of America against the Oil Barge "Doris", her engines, boats, boilers, machinery, tackle, apparel, furniture, etc., in a cause of forfeiture, civil and maritime, for the reasons and causes in the said Libel mentioned, and praying the usual process and monition of the said Court in that behalf to be made, and that all persons interested in the said Oil Barge "Doris" or vessel, her engines, boil-
94 ers, tackle, etc., may be cited in general and special to answer the premises, and all proceedings being had that the said Oil Barge "Doris" or vessel, her engines, boilers, tackle, etc., may, for the causes in the said Libel mentioned, be condemned and sold to pay the demands of the Libellant.

You are therefore hereby commanded to attach the said Oil Barge "Doris" or vessel, her engines, boilers, tackle, etc., and to detain the same in your custody until the further order of the Court respecting the same, and to give due notice to all persons claiming the same, or knowing or having anything to say why the same should not be condemned and sold pursuant to the prayer of the said Libel, that they be and appear before the said Court to be held at Trenton, in and for the District of New Jersey, on the 13th day of January 1933 at ten o'clock in the forenoon of the same day, if the same shall be a day of jurisdiction, otherwise on the next day of jurisdiction thereafter, then and there to interpose a claim for the same and to make their allegations in that behalf. And what you shall have done in

the premises, do you then and there make return thereof, together with this Writ.

Witness the Honorable William Clark, Judge of said Court, at the City of Trenton, in the District of New Jersey, this 22d day of December, in the year of our Lord one thousand nine hundred and thirty-two.

[SEAL] GEORGE T. CRANMER, *Clerk.*
Per ROSE O. MCCULLOUGH, *Deputy.*

95 NOTICE

In obedience to the within monition, I attached the Oil Barge "Doris" therein described, on the 24th day of Dec. 1932, and have given due notice to all persons claiming the same that this Court will on the 13th day of Jan. 1933 (if that day shall be a day of jurisdiction, if not, on the next day of jurisdiction thereafter) proceed to the trial and condemnation thereof should no claim be interposed for the same.

F. C. SCHNEIDER,
U. S. Marshal.
By W. G. MORRIS,
Deputy.

Dated Dec. 24, 1932.

Seized above Barge by Posting two Notices of Monition on same and serving a copy of Monition on U. S. Custom Guard #505—Sario A. Tedesco.

F. C. SCHNEIDER,
U. S. Marshal.
By W. G. MORRIS,
Deputy.

96 In United States District Court for the District of New Jersey

UNITED STATES OF AMERICA, LIBELLANT

against

OIL BARGE "DORIS", HER ENGINES, ETC., MATOIL SERVICE & TRANSPORT CO., INC., Claimant

Answer and exceptions

Filed December 28, 1932

The claimant herein, by Samuel I. Kessler, its attorney, for its answer to the libel herein, alleges as follows upon information and belief:

First. Denies all and several the allegations contained in paragraphs marked "Second", "Third", "Fourth", "Fifth", "Sixth",

"Seventh", "Ninth", "Tenth", "Twelfth", "Thirteenth", "Fifteenth", "Sixteenth", and "Seventeenth" of said libel.

Second. Claimant repeats and realleges all the admissions and denials heretofore made in answer to paragraphs marked "Eighth", "Eleventh", and "Fourteenth" of said libel.

As and for a separate, distinct, and affirmative defense and by way of exceptive allegations, the claimant herein alleges as follows:

Third. That the search and seizure as alleged in the libel by
97 the United States Coast Guard officials and/or such other officials of the United States of America was without legal right and without warrant in law and in violation of the rights of the claimant herein under the Fourth and Fifth Amendments of the Constitution of the United States of America.

Wherefore claimant prays that the libel herein be dismissed and for such other and further relief as to this Honorable Court may seem just and proper.

SAMUEL I. KESSLER,
Attorney for Claimant,
9 Clinton Street, Newark, N. J.

[*Duly sworn to by Samuel I. Kessler, jurat omitted in printing.*]

98 In United States District Court

Notice of claim

Filed December 28, 1932

And now Matoil Service & Transport Company, Inc., a Delaware corporation, intervening as owner of the above-described vessel, by its attorney, Samuel I. Kessler, appears before this Honorable Court and makes claim to the same as it is attached by the Marshal under process of this Court at the instance of the United States of America, and the said Samuel I. Kessler avers that at the time of the attachment thereof the Matoil Service & Transport Company, Inc., was and is the true and bona fide owner of the said cargo, and that no other person or corporation is the lawful owner thereof.

Wherefore he prays that the said Matoil Service & Transport Company, Inc., be permitted to appear and defend accordingly.

Dated Newark, December 27, 1932.

MATOIL SERVICE & TRANSPORT CO., INC.,
By SAMUEL I. KESSLER, *Attorney.*

[*Duly sworn to by Samuel I. Kessler, jurat omitted in printing.*]

100 In United States District Court

Exceptive allegations to claim

Filed December 28, 1932

The libellant above named hereby excepts to the claim of the Matoil Service & Transport Company, Inc., claimant in this cause, as follows:

1. That the said claimant failed to allege that the said Matoil Service & Transport Company, Inc., is the true and bona fide owner of the said Oil Barge "Doris" or that any other person is the true and bona fide owner thereof.

2. That the claimant, Matoil Service & Transport Company, Inc., failed to allege that the said Samuel I. Kessler, named as attorney therein, is duly authorized to make said claim by the said Matoil Service & Transport Company, Inc.

3. That the said Samuel I. Kessler is not duly authorized to file the claim herein on behalf of the said alleged owner, Matoil Service & Transport Company, Inc.

4. That the said claimant has failed to file stipulation for costs as prescribed by the Rules in Admiralty in the United States Supreme Court and in the United States District Court in and for the District of New Jersey.

HARLAN BESSON,
United States Attorney.

Dated December 28, 1932.

101 In United States District Court

Amendment to libel

Filed December 30, 1932

Now comes the libellant, the United States of America, by leave of the Court first had and obtained to amend the libel heretofore filed in the above-entitled cause, by inserting the following paragraphs in the place and stead of the 15th and 16th paragraphs of the Fourth Cause of Forfeiture:

15. That on the 12th day of December 1932, and during all of the time of the occurrences mentioned and described in this cause of forfeiture, the said Oil Barge "Doris" was enrolled and licensed to carry on the coasting trade pursuant to the laws of the United States of America; that on the 12th day of December 1932, aforesaid, at Port Johnson, Bayonne, in the State of New Jersey, in the District

of New Jersey, and within the jurisdiction of this Court, the said Oil Barge "Doris" was employed in a trade for which she was not licensed, in that she was unlawfully transporting and unlawfully possessing in transportation a large quantity of intoxicating liquor fit for use for beverage purposes and containing one-half of one percent or more of alcohol by volume, to wit: one hundred and forty-six thousand one hundred and fifty-seven gallons (146,157) of alcohol, in violation of the provisions of Section 3, Title II of the National Prohibition Act.

16. That by reason of the premises the said Oil Barge "Doris" became and is subject to seizure and forfeiture by the United States of America pursuant to the provisions of Section 4377 of the
102 Revised Statutes of the United States of America, also known as Section 325, Title 46, United States Code, Annotated.

HARLAN BESSON,
United States Attorney.

Dated December 28, 1932.

On this day of December 1932 I allow the within amendment to the libel filed in this cause and direct that the clerk file the same.

_____,
Judge.

In United States District Court

Exceptions to answer

Filed January 3, 1933

The libellant reserving its right to press its exceptions to the claim filed by the claimant in the above-named cause and without waiving any of its rights acquired by the filing of such exceptions hereby excepts to the answer filed by the claimant in the above-named cause for the following reasons:

1. Because said answer is not verified as prescribed by the Rules in Admiralty of the United States Supreme Court.

HARLAN BESSON,
United States Attorney.

Dated January 3, 1933.

103 In United States District Court

Final decree

Filed May 29, 1933

The Marshal having returned on the said monition duly issued to him in the above-entitled cause, that in obedience thereto he has attached the said Oil Barge "Doris" and her tackle, apparel, furni-

ture, papers, engines, and boats, and has given due notice to all persons claiming the same that the Court would on the thirteenth day of November 1932 proceed with the condemnation thereof and the usual proclamation having been made, and the Matoil Service and Transport Company, Inc., having interposed a claim and filed an answer to the said libel as the owner of the said Oil Barge "Doris", and her tackle, apparel, furniture, papers, engines, and boats, and the said libel action having been duly noticed for trial and the matter having been duly tried before the Honorable Phillip Forman, one of the judges of this court, and a decision having been duly rendered by the Court on the fifth day of May 1933 condemning as forfeited the said Oil Barge "Doris" and her tackle, apparel, furniture, papers, and engines.

Now, on motion of Harlan Besson, United States Attorney, proctor for libellant, in support of said libel and Samuel I. Kessler, appearing in opposition thereto, it is

Ordered, Adjudged, Sentenced, and Decreed, that the said Oil Barge "Doris", and her engines, tackle, apparel, furniture, boats, and papers be and the same hereby are condemned as forfeited to the United States for violation of the provisions of Section 4377 of the Revised Statutes of the United States (§ 325, Title 46, U. S. C.), as in the amended libel, filed herein, set forth; and it is further

104 Ordered, Adjudged, Sentenced, and Decreed that the Marshal do sell the said vessel and her tackle, etc., upon six days' notice of sale, and that he pay the proceeds of such sale to the clerk of this court, at a session to be holden on the twenty-third day of June 1933 and that a writ of venditioni exponas issue accordingly.

FORMAN,
Judge.

Dated May 23, 1933.

In United States District Court

Amended final decree

Filed June 29, 1933

The Marshal having returned on the said monition duly issued to him in the above-entitled cause, that in obedience thereto he has attached the said Oil Barge "Doris" and her tackle, apparel, furniture, papers, engines, and boats, and has given due notice to all persons claiming the same that the Court would on the thirteenth day of January 1933 proceed with the condemnation thereof and the usual proclamation having been made, and the Matoil Service and Transport Company, Inc., having interposed a claim and filed an answer to the said libel as the owner of the said Oil Barge "Doris", and her tackle, apparel, furniture, papers, engines, and boats, and the said libel action having been duly noticed for trial and the matter having been duly tried before the Honorable Phillip Forman, one of the

judges of this court, and a decision having been duly rendered by the Court on the fifth day of May 1933 condemning as forfeited the said Oil Barge "Doris" and her tackle, apparel, furniture, papers, and engines.

105 Now, on motion of Harlon Besson, United States Attorney, proctor for libellant, in support of said libel and Samuel I. Kessler, appearing in opposition thereto, it is

Ordered, Adjudged, and Decreed that the said Oil Barge "Doris" and her engines, tackle, apparel, furniture, boats, and papers be and the same hereby are condemned as forfeited to the United States for violation of the provisions of Section 4377 of the Revised Statutes of the United States (par. 325, Title 46, U. S. C.), as in the amended libel, filed herein, set forth; and it is further

Ordered, Adjudged, and Decreed that the Marshal do sell the said vessel and her tackle, etc., upon six days' notice of sale, and that he pay the proceeds of such sale to the clerk of this court at a session to be holden on the twenty-fifth day of August 1933, and that a writ of venditioni exponas issue accordingly; and it is further

Ordered, Adjudged, and Decreed that the proceeds of sale of said vessel be deposited in the registry of this court to be forfeited to the United States of America in the event that the decree heretofore entered herein, and as amended, becomes final by lapse of time within which appeal may be taken, or be affirmed upon appeal in the event an appeal is taken, and that in the event the decree herein, as amended, shall be reversed on appeal and final judgment entered for the claimant of said vessel, then the said proceeds of sale so deposited as aforesaid in the registry of this court shall become the property of and be delivered to the said claimant; and it is further

Ordered, Adjudged, and Decreed that the said proceeds of
106 sale so deposited in the registry of this court, shall be substituted in the place and stead of said vessel, and that all further proceedings herein shall be against said proceeds of sale.

FORMAN, *Judge.*

In United States District Court

Order extending time of sale

Filed August 2, 1933

This matter being opened to the Court by Harlan Besson, United States Attorney in and for the District of New Jersey, and it appearing to the Court that the United States Marshal in and for the District of New Jersey had not had sufficient time to conduct the proceedings for the sale of 146,157 gallons of alcohol heretofore seized on the Oil Barge "Doris" and forfeited to the United States, which said vessel contains large storage tanks, and that the United States of America has no convenient place for the storage of said 146,157 gallons of alcohol pending the sale thereof, and that the time of the United

States Marshal in and for the District of New Jersey to make return on the sale of the said 146,157 gallons of alcohol has heretofore been extended to September 15, 1933;

It Is on this first day of August, A. D. 1933, Ordered, Adjudged, and Decreed that the time of the United States Marshal for making a return of the sale of the Oil Barge "Doris", heretofore seized and forfeited to the United States in this cause, be and the same is hereby extended to the fifteenth day of September, A. D. 1933.

FORMAN, *Judge.*

107 In United States District Court for the District of New Jersey

A–7813

UNITED STATES OF AMERICA, LIBELLANT

against

AMERICAN MOTOR OIL SCREW "EVELYN"

Harlan Besson, U. S. Attorney, Trenton, N. J., for libellant.
Kessler and Kessler, 9 Clinton Street, Newark, N. J., and Minturn and Weinberger, 60 Park Place, Newark, N. J., for claimant.

Docket entries

Dec. 22, 1932. Libel for Forfeiture.
Dec. 22, 1932. Monition issued retble Jan. 13/33.
Dec. 28, 1932. Notice of claim.
Dec. 28, 1932. Answer & exceptions.
Dec. 28, 1932. Exceptive Allegations to claim.
Dec. 30, 1932. Amendment to libel.
Dec. 30, 1932. Stipulation for costs.
Dec. 30, 1932. Hearing. Judge Forman.
Dec. 30, 1932. Motion retd. served.
Jan. 3, 1933. Exceptions to answer.
Jan. 20, 1933. Hearing adjourned to Jan. 27.
108 Mar. 22, 1933. Memorandum of Court filed in 7814.
May 30, 1933. Hearing before Judge Forman; see 7810.
May 9, 1933. Memorandum of Court filed in 7814.
May 29, 1933. Final decree.
June 29, 1933. Amended final decree.
June 29, 1933. Notice of appeal.
June 29, 1933. Order allowing appeal.
June 29, 1933. Assignments of Error.
June 28, 1933. Citation to U. S. C. C. of A. issued.
July 7, 1933. Citation returned; service acknowledged.

July 7, 1933. Orig Citation forwarded to U. S. C. C. of A. (copy on file).

July 17, 1933. Order for consolidation of trial in appellate Court filed in 7814.

Aug. 1, 1933. Ven. Exp. issued retble Aug. 25.

109 In United States District Court, For the District of New Jersey

Libel

Filed December 22, 1932

To the Honorable the Judges of the United States District Court for the District of New Jersey:

The libel of information of the United States of America by its proctor, Harlan Besson, United States Attorney for the District of New Jersey (by Isador S. Worth, Assistant United States Attorney) against American Motor Oil Screw "Evelyn", her engines, boats, boilers, tackle, and apparel in a cause of forfeiture, civil and maritime, for breach of provisions of Section 584, Paragraph 814, Section 594 of the Tariff Act of 1930 and Section 4377 of the Revised Statutes of the United States, upon information and belief alleges as follows:

FOR A FIRST CAUSE OF FORFEITURE

1. That at all times hereinafter mentioned libellant was and still is a corporation sovereign.

2. That the Motor Oil Screw "Evelyn" is an American licensed vessel.

3. That on or about the 12th day of December 1932, prior to the filing of this libel, the said Motor Oil Screw "Evelyn" was within the admiralty and maritime jurisdiction of the United States of America and within the Federal District of New Jersey, to wit, at the Central Railroad Dock, at Port Johnson, Bayonne, in the
110 District of New Jersey, and was on the day aforesaid lawfully boarded and searched by members of the United States Customs Service.

4. That on or about the said time the said Motor Oil Screw "Evelyn" was seized by officers of the United Staes Coast Guard as forfeited to the United States for violation of the provisions hereinabove set forth, and that the said vessel has remained and still is in the possession and custody of the Collector of Customs of the Port of New York as forfeited to the United States.

5. That demand was made of the Master and/or the person in charge of said vessel by an officer of the United States, lawfully entitled so to do, for the production of the manifest of the said vessel and that the said manifest was not produced in accordance with said demand and thereupon the said Master or person in charge of said vessel became liable to a penalty of five hundred dollars and the

vessel became subject to forfeiture in accordance with Section 584 of the Tariff Act of 1930.

6. That on said date there was found on board said boat four and one-half gallons of alcohol, which said merchandise was not included or described in the manifest of said vessel and which said merchandise was of the value of $24.08.

7. By reason thereof and in accordance with section 584 of the Tariff Act of 1930, the said vessel became subject to forfeiture and may be libelled therefor in any United States Court.

FOR A SECOND CAUSE OF FORFEITURE

8. The allegations contained in paragraphs 1, 2, 3, and 4 of the first cause of forfeiture are here repeated.

9. That the merchandise described in the paragraphs hereinabove referred to contained more than one-half of one per-
111 centum of alcohol and had been imported into the United States without proper permit for same having been issued as provided for by law.

10. That by reason thereof and under the provisions of paragraph 814 of the Tariff Act of 1930 the said vessel became subject to forfeiture and may be libelled therefor in any United States Court.

FOR A THIRD CAUSE OF FORFEITURE

11. The allegations contained in paragraphs 1, 2, 3, and 4 of the first cause of forfeiture are here repeated.

12. That on or about the 12th day of December 1932 there was unladened, transshipped to, placed in, and received in the said vessel four and one-half gallons of alcohol, all of the value of $24.08, and in violation of the provisions of Section 584 and paragraph 814 of the Tariff Act of 1930; therefore the Master of the said vessel and any person aiding or assisting thereon became liable to the penalty equal to twice the value of said merchandise, to wit: $48.16, and the said vessel became subject to forfeiture in any United States Court.

13. That by all of which, as aforesaid, the said Oil Screw "Evelyn" became liable in accordance with Section 594 of the Tariff Act of 1930 to be seized and proceeded against summarily by libel to recover the penalties hereinabove set out, and that the said Oil Screw "Evelyn" is subject to forfeiture and may be libelled therefor in any United States Court.

FOR A FOURTH CAUSE OF FORFEITURE

14. The allegations contained in paragraphs 1, 2, 3, and 4 of the first cause of forfeiture are here repeated.

112 15. That on or about the 12th day of December 1932 the said Motor Oil Screw "Evelyn" was employed in a trade other than that for which she was licensed, to wit, the transportation of

intoxicating liquor within the territorial waters of the United States, to wit, at Port Johnson, Bayonne, in the District of New Jersey.

16. That the trade of transporting intoxicating liquor in the territorial waters of the United States in the District of New Jersey on December 12, 1932, in which trade said vessel was engaged was an illicit trade.

17. That by reason of the premises said became and is subject to seizure and forfeiture by the United States pursuant to the provisions of Section 4377 of the Revised Statutes of the United States and may be libelled therefor in any United States Court.

Wherefore libellant prays that process in due form of law according to the course and practice of this Honorable Court in causes of admiralty and maritime jurisdiction may issue against the said Motor Oil Screw "Evelyn", her engines, boats, boilers, tackle, apparel, and furniture, and that all persons claiming any right, title, or interest therein may be cited to appear and answer on oath all and singular the matter aforesaid, and that the libellant may have such other and further relief as in law and justice it may be entitled to recover.

HARLAN BESSON,
United States Attorney, District of New Jersey.
By ISADOR S. WORTH,
Asst. United States Attorney.

Dated December 21, 1932.

113 In United States District Court

Monition

Filed December 30, 1932

The President of the United States of America.
To the Marshal of the District of New Jersey, Greeting:

Whereas a Libel was filed in the District Court of the United States for the District of New Jersey on the 22nd day of December, in the year of our Lord one thousand nine hundred and thirty-two, by United States of America against the American Motor Oil Screw "Evelyn", her engines, boats, boilers, machinery, tackle, apparel, furniture, etc., in a cause of forfeiture, civil and maritime, for the reasons and causes in the said Libel mentioned, and praying the usual process and monition of the said Court in that behalf to be made, and that all persons interested in the said American Motor Oil Screw "Evelyn", or vessel, her engines, boilers, tackle, etc., may be cited in general and special to answer the premises, and, all proceedings being had, that the said American Motor Oil Screw "Evelyn" or vessel, her engines, boilers, tackle, etc., may, for the causes in the said Libel mentioned, be condemned and sold to pay the demands of the Libellant.

You Are Therefore Hereby Commanded to attach the said
114 American Motor Oil Screw "Evelyn", or vessel, her engines,

boilers, tackle, etc., and to detain the same in your custody until the further order of the Court respecting the same, and to give due notice to all persons claiming the same, or knowing or having anything to say why the same should not be condemned and sold pursuant to the prayer of the said Libel, that they be and appear before the said Court to be held at Trenton, in and for the District of New Jersey, on the 13th day of January 1933, at ten o'clock in the forenoon of the same day, if the same shall be a day of jurisdiction, otherwise on the next day of jurisdiction thereafter, then and there to interpose a claim for the same, and to make their allegations in that behalf. And what you shall have done in the premises do you then and there make return thereof, together with this Writ.

Witness the Honorable William Clark, Judge of said Court, at the City of Trenton, in the District of New Jersey, this 22nd day of December, in the year of our Lord one thousand nine hundred and thirty-two.

[SEAL]

GEORGE T. CRANMER,
Clerk.
Per ROSE O. MCCULLOUGH,
Deputy.

115 NOTICE

In obedience to the within monition, I attached the American motor oil screw "Evelyn", therein described, on the twenty-fourth day of December 1932, and have given due notice to all persons claiming the same, that this Court will, on the thirteenth day of January 1933 (if that day shall be a day of jurisdiction; if not, on the next day of jurisdiction thereafter), proceed to the trial and condemnation thereof, should no claim be interposed for the same.

F. C. SCHNEIDER,
U. S. Marshal.
By EDWARD W. VAN DUYNE, Jr.,
Deputy.

Dated Dec. 24th, 1932.

Served copy of monition on John Due, U. S. Customs Guard in charge at Port Newark on the twenty-fourth day of December 1932.

116 In United States District Court for the District of New Jersey

UNITED STATES OF AMERICA, LIBELLANT
against
AMERICAN OIL SCREW "EVELYN", HER ENGINES, ETC., MATOIL SERVICE & Transport Co., Inc., claimant

Notice of claim

Filed December 28, 1932

And now Matoil Service & Transport Co., Inc., a Delaware corporation, intervening as owner of the above-described vessel, by its

attorney, Samuel I. Kessler, appears before this Honorable Court and makes claim to the same as it is attached by the marshal under process of this Court, at the instance of the United States of America, and the said Samuel I. Kessler avers, that at the time of the attachment thereof the Matoil Service & Transport Co., Inc., was and is the true and bona fide owner of the said cargo, and that no other person or corporation is the lawful owner thereof.

Wherefore he prays that the said Matoil Service & Transport Co., Inc., be permitted to appear and defend accordingly.

Dated: Newark, December 27, 1932.

MATOIL SERVICE & TRANSPORT CO., INC.,
By SAMUEL I. KESSLER, *Attorney.*

117 [*Duly sworn to by Samuel I. Kessler, jurat omitted in printing.*]

In United States District Court

Answer and exceptions

Filed December 28, 1932

The claimant herein, by Samuel I. Kessler, its attorney, for its answer to the libel herein, alleges as follows upon information and belief:

First Denies all and several the allegations contained in paragraphs marked "Second", "Third", "Fourth", "Fifth", "Sixth", "Seventh", "Ninth", "Tenth", "Twelfth", "Thirteenth", "Fifteenth", "Sixteenth", and "Seventeenth" of said libel.

Second. Claimant repeats and realleges all the admissions and denials heretofore made in answer to paragraphs marked "Eighth", "Eleventh", and "Fourteenth" of said libel.

As and for a separate, distinct, and affirmative defense and by way of exceptive allegations, the claimant herein alleges as follows:

Third. That the search and seizure as alleged in the libel by the United States Coast Guard officials and/or such other officials of the United States of America was without legal right and without warrant in law and in violation of the rights of the claimant herein under the Fourth and Fifth Amendments of the Constitution of the United States of America.

Wherefore claimant prays that the libel herein be dismissed and for such other and further relief as to this Honorable Court may seem just and proper.

SAMUEL I. KESSLER,
Attorney for Claimant,
9 Clinton Street, Newark, N. J.

119 [*Duly sworn to by Samuel I. Kessler, jurat omitted in printing.*]

120 In United States District Court

Exceptive allegations to claim

Filed December 28, 1932

The libellant above named hereby excepts to the claim of the Matoil Service & Transport Company, Inc., claimant in this cause, as follows:

1. That the said claimant failed to allege that the said Matoil Service & Transport Company, Inc., is the true and bona fide owner of the said Motor Oil Screw "Evelyn" or that any other person is the true and bona fide owner thereof.

2. That the claimant, Matoil Service & Transport Company, Inc., failed to allege that the said Samuel I. Kessler, named as attorney therein, is duly authorized to make said claim by the said Matoil Service & Transport Company, Inc.

3. That the said Samuel I. Kessler is not duly authorized to file the claim herein on behalf of the said alleged owner, Matoil Service & Transport Company, Inc.

4. That the said claimant has failed to file stipulation for costs as prescribed by the Rules in Admiralty in the United States Supreme Court and in the United States District Court in and for the District of New Jersey.

HARLAN BESSON,
United States Attorney.

Dated December 28, 1932.

121 In United States District Court

Amendment to Libel

Filed December 30, 1932

Now comes the libellant, the United States of America, by leave of the Court first had and obtained, to amend the libel heretofore filed in the above-entitled cause, by inserting the following paragraphs in the place and stead of the fifteenth and sixteenth paragraphs of the fourth cause of forfeiture:

15. That on the twelfth day of December 1932, and during all of the time of the occurrences mentioned and described in this cause of forfeiture, the said Motor Oil Screw "Evelyn" was enrolled and licensed to carry on the coasting trade pursuant to the laws of the United States of America; that on the twelfth day of December 1932, aforesaid, at Port Johnson, Bayonne, in the State of New Jersey, in the District of New Jersey, and within the jurisdiction of this Court, the said Motor Oil Screw "Evelyn" was employed in a trade for

which she was not licensed, in that she was unlawfully transporting and unlawfully possessing in transportation a quantity of intoxicating liquor fit for use for beverage purposes and containing one-half of one percent or more of alcohol by volume, to wit: four and one-half gallons of alcohol, in violation of the provisions of Section 3, Title II, of the National Prohibition Act.

16. That by reason of the premises said Motor Oil Screw "Evelyn" became and is subject to seizure and forfeiture by the United States of America pursuant to the provisions of Section 4377 of the Revised Statutes of the United States of America, also known as Section 325, Title 46, United States Code Annotated.

HARLAN BESSON,
United States Attorney.

Dated December 29, 1932.

122 ORDER

On this day of December 1932, I allow the within amendment to the libel filed in this cause and direct that the clerk file the same.

_____,
Judge.

In United States District Court

Exceptions to Answer

Filed January 3, 1933

The libellant reserving its right to press its exceptions to the claim filed by the claimant in the above-named cause and without waiving any of its rights acquired by the filing of such exceptions hereby excepts to the answer filed by the claimant in the above-named cause for the following reason:

1. Because said answer is not verified as prescribed by the Rules in Admiralty of the United States Supreme Court.

HARLAN BESSON,
United States Attorney.

Dated January 3, 1933.

123 In United States District Court

Final decree

Filed May 29, 1933

The Marshal having returned on the said monition duly issued to him in the above-entitled cause, that in obedience thereto he has attached the said Motor Oil Screw "Evelyn" and her tackle, apparel, furniture, papers, engines, and boats, and has given due notice to all

persons claiming the same that the Court would, on the thirteenth day of November 1932, proceed with the condemnation thereof; and the usual proclamation having been made, and the Matoil Service and Transport Company, Inc., having interposed a claim and filed an answer to the said libel as the owner of the said Motor Oil Screw "Evelyn" and her engines, tackle, apparel, furniture, papers, and boats, and the said libel action having bee nduly noticed for trial and the matter having been duly tried before the Honorable Phillip Forman, one of the Judges of this court, and a decision having been duly rendered by the Court on the fifth day of May 1933 condemning as forfeited the said Oil Screw "Evelyn" and her tackle, apparel, furniture, papers, and engines.

Now, on motion of Harlan Besson, United States Attorney, proctor for libellant, in support of said libel, and Samuel I. Kessler, appearing in opposition thereto; it is

Ordered, adjudged, sentenced, and decreed that the said Oil Screw "Evelyn" and her engines, tackle, apparel, furniture, boats, and papers be, and the same are hereby, condemned as forfeited to the United States for violation of the provisions of Section 4377
124 of the Revised Statutes of the United States (§ 325, Title 46, U. S. C.), as in the amended libel filed herein set forth; and it is further

Ordered, adjudged, sentenced, and decreed that the Marshal do sell the said vessel and her tackle, etc., upon six days' notice of sale, and that he pay the proceeds of such sale to the clerk of this Court, at a session to be holden on the twenty-third day of June 1923, and that a writ of venditioni exponas issue accordingly.

FORMAN, *Judge.*

Dated May 23, 1933.

In United States District Court

Amended final decree

Filed June 29, 1933

The Marshal having returned on the said monition duly issued to him in the above-entitled cause, that in obedience thereto he has attached the said Motor Oil Screw "Evelyn" and her tackle, apparel, furniture, papers, engines, and boats and has given due notiee to all persons claiming the same that the Court would, on the thirteenth day of January 1933, proceed with the condemnation thereof and the usual proclamation having been made, and the Matoil Service and Transport Company, Inc., having interposed a claim and filed an answer to the said libel as the owner of the said Motor Oil Screw "Evelyn" and her engines, tackle, apparel, furniture, papers, and boats, and the said libel action having been duly noticed for trial and the matter having been duly tried before the Honorable Phillip Forman, one of the Judges of this court, and a decision having

been duly rendered by the Court on the fifth day of May 1933 condemning as forfeited the said Oil Screw "Evelyn" and her tackle, apparel, furniture, papers, and engines.

Now, on motion of Harlan Besson, United States Attorney, proctor for libellant, in support of said libel, and Samuel I. Kessler, appearing in opposition thereto, it is

Ordered, Adjudged, and Decreed that the said Oil Screw "Evelyn", and her engines, tackle, apparel, furniture, boats, and papers be, and the same are hereby, condemned as forfeited to the United States for violation of the provisions of Section 4377 of the Revised Statutes of the United States (par. 325, Title 46, U. S. C.), as in the amended libel, filed herein, set forth; and it is further

Ordered, Adjudged, and Decreed that the Marshal do sell the said vessel and her tackle, etc., upon six days' notice of sale, and that he pay the proceeds of such sale to the clerk of this Court, at a session to be holden on the twenty-fifth day of August 1933, and that a writ of venditioni exponas issue accordingly; and it is further

Ordered, Adjudged, and Decreed that the proceeds of sale of said vessel be deposited in the registry of this Court to be forfeited to the United States of America in the event that the decree heretofore entered herein, and as amended, becomes final by lapse of time within which appeal may be taken, or be affirmed upon appeal in the event an appeal is taken, and that in the event the decree herein as amended shall be reversed on appeal and final judgment entered for the claimant of said vessel, then the said proceeds of sale so deposited as aforesaid, in the registry of this Court, shall become the property of and be delivered to the said claimant; and it is further

Ordered, Adjudged, and Decreed that the said proceeds of sale so deposited in the registry of this Court shall be substituted in the place and stead of said vessel, and that all further proceedings herein shall be against said proceeds of sale.

FORMAN, *Judge.*

June 28, 1933.

In United States District Court for the District of New Jersey

[Titles omitted.]

No. A–7813

No. A–7815

No. A–7811

Notice of appeal

Filed June 29, 1933

SIR: Please Take Notice that the claimant, the Matoil Service & Transport Company, Inc., hereby appeals to the United States Circuit

Court of Appeals for the Third Circuit from the final decree signed by the Hon. Phillip Forman, one of the Judges of this Court, and entered herein on the twenty-seventh day of May 1933; and that the claimant hereby appeals from each and every part of said decree, as well as the whole thereof.

Dated Newark, N. J., May 31, 1933.

Yours, &c.,

SAMUEL I. KESSLER,
Proctor for Claimant.

To: HARLAN BESSON, ESQUIRE,
United States Attorney, District of New Jersey,
Post Office Building, Trenton, New Jersey.

The appeal herein is hereby allowed.

FORMAN, *U. S. D. J.*

June 28, 1933.

129 In United States District Court for the District of New Jersey

[Titles omitted.]

No. A–7814

No. A–7815

130 No. A–7811

Order allowing appeal

Filed June 29, 1933

The claimant, Matoil Service & Transport Company, Inc., in the above-named libels, feeling aggrieved by the final decree entered herein on the twenty-seventh day of May 1933 does hereby appeal from the said final decree to the United States Circuit Court of Appeals for the Third Circuit and prays that this appeal may be allowed.

AND NOW, on this twenty-eighth day of June 1933, it is ORDERED that the appeal be allowed as prayed for and it is further

FORMAN, *Judge.*

131 In United States District Court for the District of New Jersey

[Titles omitted.]

No. A–7813

No. A–7815

No. A–7811

Assignments of error

Filed June 29, 1933

132 And now comes the Matoil Service and Transport Company, Inc., the claimant, by Samuel I. Kessler, its attorney, and says that in the record, proceedings and judgment in the above-stated cause there is manifest error in the following, to wit:

1. The Court erred in decreeing forfeiture of the oil screw "Evelyn", the barges "Doris" and "Helen", as above described.

2. The Court erred in failing to dismiss the libel proceedings on the ground that the libellant obtained custody and control of the said vessels, to wit: The oil screw "Evelyn", the barges "Doris" and "Helen", by reason of an illegal search and seizure effected by a Federal officer.

3. The Court erred in decreeing forfeiture of the said vessels without proof on the part of the libellant that said search and seizure was illegal and not in violation of the constitutional rights of the claimant, Matoil Service & Transport Company, Inc.

4. The Court erred in decreeing forfeiture of the vessels on each and every cause enumerated in said libels.

133 5. The Court erred in decreeing forfeiture of the cargo on the libel which is insufficient on its face to spell out a cause for forfeiture in that it fails to allege a lawful seizure of the said vessels.

6. The Court erred in failing to dismiss the libels on the ground that there was no proof that the said vessels were engaged in the trade of importing cargo into the United States.

7. The Court erred in decreeing forfeiture under the cause set forth in the libel on the ground that the vessels in question being of American registry and not bound to the United States from a foreign port were not required to carry a manifest.

8. The Court erred in decreeing forfeiture in that the libellant failed to prove that the vessels in question were such as under the law were required to carry manifests.

9. The Court erred in decreeing forfeiture in the absence of proof that the vessels were engaged in importing cargo into the United States.

10. The Court erred in failing to dismiss the libels and to restore the vessels to the said Matoil Service & Transport Company, Inc.

11. The Court erred in decreeing forfeiture under the fourth cause of forfeiture on the ground that there was no proof of any transportation.

12. The Court erred in decreeing forfeiture of the said vessels in that there was no proof offered by the libellant that the said vessels, or any of them, were employed in a trade for which it was not licensed.

134 13. The Court erred in entering decrees for forfeiture in that there was no proof offered on behalf of the libellant that the said vessels, or any of them, were employed in trade.

SAMUEL I. KESSLER,
Proctor for Claimant,
Office and P. O. Address, 9 Clinton Street, Newark, N. J.

135 In United States District Court for the District of New Jersey

No. A–7814

On Libel, etc.

UNITED STATES OF AMERICA, LIBELLANT

v.

146,157 GALLONS OF ALCOHOL (FRANK RIZZO, CLAIMANT)

No. A–7813

On Libel, etc.

UNITED STATES OF AMERICA, LIBELLANT

v.

AMERICAN MOTOR OIL SCREW "EVELYN", HER ENGINES, BOATS, BOILERS, Tackle, and Apparel, Matoil Service & Transport Company, Inc., claimant

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136 No. A–7815

On Libel, etc.

UNITED STATES OF AMERICA, LIBELLANT

v.

OIL BARGE "DORIS", HER ENGINES, BOATS, BOILERS, TACKLE, APPAREL, and Furniture, Matoil Service & Transport Company, Inc., claimant

No. A-7811

On Libel, etc.

UNITED STATES OF AMERICA, LIBELLANT

v.

THE OIL BARGE "HELEN", HER ENGINES, BOATS, BOILERS, TACKLE, Apparel, and Furniture, Matoil Service & Transport Company, Inc., claimant

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UNITED STATES OF AMERICA, LIBELLANT

v.

THREE GALLONS OF ALCOHOL

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137 UNITED STATES OF AMERICA, LIBELLANT

v.

FOUR AND ONE-HALF GALLONS OF ALCOHOL

Statement of evidence

Before Honorable Phillip Forman, Judge, on Friday, December 30, 1932, in the Post Office Building at Trenton, New Jersey.

Appearances: Hon. Harlan Besson and Isador S. Worth, Esq., for the Government; Minturn & Weinberger, Esqs., by Harry H. Weinberger, Esq., and Louis Halle, Esq., for Frank Rizzo; Kessler & Kessler, Esqs., by Samuel I. Kessler, Esq., for Matoil Service & Transport Company, Inc.

Colloquy

Mr. BESSON. If Your Honor please, there are pending before the Court now six proceedings on libel in admiralty for the condemnation of three vessels the gas oil screw "Evelyn", the barge "Doris", and the barge "Helen", and the cargoes of these three vessels, respectively, 146,157 gallons of alcohol aboard the "Doris", three gallons of alcohol on the barge "Helen", and four and one-half gallons of alcohol on the screw "Evelyn."

Now, after these libels had been filed—or rather I should preface it by saying before the libels had been filed—a petition was filed with this Court and an order to show cause issued before your Honor. I think the petition alleged, in effect, that the vessels were
138 boarded and seized without probable cause, and the Court on the return of the rule made an order to show cause requiring the Government to file its libel or libels against these vessels and the cargoes within ten days or release them—release the cargo. The

libels were filed within the time fixed. A man by the name of Frank Rizzo or Rizzy filed a claim for the cargo aboard the "Doris", alleging that he was the true owner. The Matoil and Transport Company filed three claims, respectively, against the three boats, and Mr. Kessler appeared as the attorney. The Government filed exceptive allegations against all of these claims. I think that I might well state briefly the nature of the exceptive allegations:

"That the said Frank Rizzo is not the true and bona fide owner of the said 146,157 gallons of alcohol as alleged in the verified claim heretofore filed in this cause by the said Frank Rizzo, and that he is without lawful right or authority to make claim of the said 146,157 gallons of alcohol attached by the United States Marshal in and for the District of New Jersey under process of this court.

"That the said 146,157 gallons of alcohol mentioned and described in the said claim of the said Frank Rizzo is intoxicating liquor fit for beverage purposes, containing one-half of one percent alcohol by volume and is and was the property of the United States of America at the time of the seizure thereof because the said alcohol was not in containers, as prescribed by the laws of the United States of America, nor was it stamped and branded, nor was it in containers stamped and branded, nor in a bonded warehouse, as prescribed by the laws of the United States of America."

139 The third ground, "That the said 146,157 gallons of alcohol was intoxicating liquor fit for use for beverage purposes, containing one-half of one percent of alcohol by volume, and was intended by the said Frank Rizzo or divers persons yet unknown to the libellant for use in violation of the provisions of Title II of the National Prohibition Act, and that no property rights exist in the said 146,157 gallons of alcohol and no claim can be lawfully filed by any one."

Now, I think that that cause is one which would have to be heard; the questions arising on the exceptive allegations in that case would probably have to be separately heard from the other exceptive allegations.

The COURT. Well, Mr. Besson, I don't understand that we are going into the final hearing of these causes now.

Mr. BESSON. No; we are not, your Honor; but here is my contention. Counsel has made objections to the manner of seizure. Now, it is well settled that before they can make any objection to the search and seizure of property they must have some interest in the property.

The COURT. That is right.

Mr. BESSON. Now, their interest in that property is established in this procedure by their claim. Now, we challenge that interest at the outset. We say that these people have no interest in the property which they can assert in this court and have no right to any relief here. They are mere intermeddlers; they have no status whatever before the Court.

The COURT. I understand that you want to amend your libel; is that so?

Mr. BESSON. Yes, sir.

140 The COURT. All right; that is not consented to. You offered me a——

Mr. BESSON. I want to amend the libel in each case, and that is the form the amendment will take. It is the amendment to paragraph 15 and 16 of the libel.

The COURT. For the purpose of the record, do you want to state any objection to the amendment of the libel?

Mr. WEINBERGER. None other than this: I understand that the proceeding in admiralty does not permit of an exceptive allegation such as sought.

The COURT. This has nothing to do with the exceptive allegations. We have not got up to those now. I am dealing with the libel and the amendment to the libel. Mr. Besson offers to amend the libel.

Mr. WEINBERGER. To that we formally object.

The COURT. Unless you state some reason, I don't think your objection will even be considered in the higher courts, where I expect you are on your way to, now.

Mr. WEINBERGER. I hope they are, if your Honor please. We are satisfied.

The COURT. One party or the other, I don't know which, but this is usually just a way station.

Mr. WEINBERGER. May we be excused from going on record as consenting?

The COURT. All right. That is all right.

Mr. WEINBERGER. Thank you.

The COURT. I will permit the libels to be amended in the form as offered by the United States Attorney upon the service of proper copies.

141 Mr. WEINBERGER. We have been served, for the purpose of the record.

The COURT. All right, under rule 23 of the admiralty rules. Now, then, we have an amended libel, duly amended, Mr. Besson. As I understand it, Mr. Weinberger has served you with a motion to dismiss the libel and that motion, it seems to me, frames the issues here today.

Mr. BESSON. Does your Honor overlook the fact that before making such a motion counsel must establish that the party that they represent has status in this Court which would entitle them to make that motion?

The COURT. No; I don't at all. I say this, if I take into cognizance all pleadings which I think have been untimely filed—that may be a little, that thought may be a little premature.

Mr. BESSON. Yes, sir.

The COURT. That there has got to be some orderly procedure, otherwise I will be plunging myself into a final hearing on the entire cause.

Mr. BESSON. Yes, sir.

The COURT. Because I think with admirable zealousness upon the part of both sides you have your pleadings in shape so that it could be tried as a final hearing today, which I do not propose to do, because it would not be fair to the other numerous admiralty causes on the list to go into a final hearing of the matter of a case that was started ten days ago.

Mr. WEINBERGER. We would like to reserve the right, because of the amended pleading, to be given time to file an answer.

142 The COURT. That will be granted to you.

Mr. WEINBERGER. Thank you.

The COURT. We will proceed under this notice to dismiss your libel, which is supported by an affidavit by Mr. Weinberger. You have a copy of that, have you not, Mr. Besson?

Mr. BESSON. Yes, sir.

The COURT. Now, as I understand it, the serious phase of groundwork for this motion is the illegal, alleged illegal, search and seizure. My thought on this subject is, Mr. Weinberger, that having made that allegation it is essential for you to produce some proof in addition to this affidavit that you support your motion with, which is, after all, your affidavit, and bearing in mind Mr. Besson's admonition. I think it is true that you have got to show some property interest in this seizure of the thing itself before you can start off on the thing.

Mr. WEINBERGER. On that point, if your Honor please, your Honor will observe that the affidavit remains uncontradicted; we were served with no answering affidavit, and assumed, of course, that the Government was not in the position to contradict what we urge. And the practice is, I understand, where affidavits are not offered and served in contradiction of what we say we have the right to assume——

The COURT. Let us examine the affidavit. Harry H. Weinberger, being duly sworn, says he is the attorney for the claimant herein. I don't suppose that needs any particular affidavit of denial. "That the libel herein instituted for the forfeiture of the said 146,157 gallons of alcohol, for a breach of provisions of section 584 of the

143 revised statutes of the United States." Well, I assume that means that there was a libel filed.

Do you follow me on paragraph two?

Mr. WEINBERGER. Yes, I do. You are right in that assumption.

The COURT. Well, of course, that is admitted. There is a libel filed.

"Three: The claimant herein has appeared and filed an answer and exceptions to the said libel. Your deponent now moves on the exceptions so filed, for a dismissal of the said libel, and for the following reasons:

As to First Cause of Forfeiture

"1. That the said first cause of forfeiture failed to allege that the said oil barge 'Doris' was a vessel bound to the United States from a foreign port.

"2. The said oil barge 'Doris' was not required by law to possess a manifest."

That is just negativing the pleadings in the libel.

Mr. WEINBERGER. No; on the contrary, we say legally that is a jurisdictional factor that must be averred, and the failure to do it and our calling attention to the infirmity or vice in the pleadings would throw them out on that ground.

The COURT. As a matter of law.

Mr. WEINBERGER. Yes; we raise it as a matter of law. I mean we concede what they say in the libel, but we say the law on the subject is clearly contrary to what they say there because they don't aver it was a vessel engaged as stated in the pleading.

144. The COURT. You say "The said oil barge 'Doris' was not required by law to possess a manifest."

Mr. WEINBERGER. That is correct.

The COURT. That is as to the first cause of forfeiture; and they allege in their libel as to the second cause of forfeiture the alcohol was not imported into the United States.

Mr. WEINBERGER. Number two says it was not required by law to possess a manifest.

The COURT. Yes; I mentioned that. As to the second cause of forfeiture you say the said alcohol was not imported into the United States. As to the third cause of forfeiture you say that Section 594 of the Tariff Act of 1930 is applicable solely to vessels or vehicles and not to the merchandise or subject matter thereon contained.

Mr. WEINBERGER. Again a legal questior

The COURT. As to the fourth cause of forfeiture, "The said oil barge 'Doris' was not employed in the trade of transporting intoxicating liquor." And then you make exceptions generally to the libel. You say, "The said search and seizure of the 146,157 gallons of alcohol was illegal and unlawful and without probable cause and in violation of claimant's rights under the fourth and fifth amendments to the constitution of the United States of America."

Now, then, to go back to paragraph three, I suppose for the purpose of this motion you have to make the answer and exceptions to the libel a part of these moving papers in order to establish some person who intervenes in this action because after all it is an action in rem against the things themselves.

When we get down to the answer and exceptions, say, in the case of United States of America against 146,157 gallons of alcohol

145 it says, "Claimant appearing herein by Minturn & Weinberger, Esqs., answering the libel, and by way of exception to this libel, alleged——" certain things.

Mr. WEINBERGER. Your Honor will find the notice of claim. I think that will answer your Honor's question. There is only one notice of claim filed, and I think you will find it on file, verified claim.

The COURT. Yes.

Mr. WEINBERGER. Notice of claim filed by Frank Rizzo.

The COURT. Yes; "And now comes Frank Rizzo intervening as owner of said 146,157 gallons of alcohol and appears before this Honorable Court, and makes claim to the said 146,157 gallons of alcohol", and says that he is the true and bona fide owner of the alcohol.

Mr. WEINBERGER. May I supplement that, perhaps I am somewhat startled at my friend Mr. Besson's move here, but I thought they made the move and arrested Rizzo in this case charging him with being the man in possession, and the criminal complaint so states. I am a little surprised now that they are questioning their own acts. To me it looked like an admitted fact here that the Government charged this man with being in custody and possession of alcohol, and that was a conceded fact.

The COURT. Well——

Mr. WEINBERGER. The complaint which I have in my hand, a copy of it, before Commissioner Stanton——

Mr. BESSON. I object to that, your Honor. I think that is an irregular method of proceeding. What has this complaint made before Commissioner Stanton got to do with this admiralty case?

The COURT. I don't know.

146 Mr. BESSON. I certainly object to it at this time as improper and having no relation to the proceedings in their present stage.

Mr. WEINBERGER. If your Honor please, maybe before the proceedings——

Mr. BESSON. A man may possess something and have no ownership whatever, he may be a thief and steal, he can possess a thing——

Mr. WEINBERGER. Not when he files a claim.

Mr. BESSON. A thief might possess a watch or a bottle of whiskey.

The COURT. Now, Mr. Weinberger, if I fetched in for you on your notice of motion this claim which is not actually even mentioned in your "claimant herein has appeared and filed answer and exceptions to the said libel." If I read out and make a part of your moving papers on this motion the notice of claim and the answer and exceptions, I am certainly going to read out and let the Government deny, as I know it has done by this time, the truth of the ownership, as it wishes to do, and make that an issue on this motion.

Mr. WEINBERGER. May I say to your Honor on the question—getting to the vital question involved here so that we may have the matter presented to your Honor, irrespective of what the effects are, and you may say your Honor reads out, what is the answer to the question, who assumes the affirmative of this proceeding at this time which involves the question of was there an ilegal search and seizure.

The COURT. I think you do.

Mr. WEINBERGER. Now, on that subject——

The COURT. Yes.

Mr. WEINBERGER. Getting right down to the point your
147 Honor has in mind, Mr. Halle is familiar with this situation. I would like your Honor to indulge him a moment on the ques-

tion, although I will say to your Honor the question is not a novel one; it has been disposed of in the Cost case—I am going to ask your Honor to hear Mr. Halle.

The COURT. All right, I will hear Mr. Halle.

Mr. HALLE. May it please the Court, the Cost case has ruled definitely.

The COURT. That was the case where Judge Runyon sat in the return of a lot of liquor?

Mr. HALLE. Yes. I think the case was originally before Judge Rellstab, and an appeal was taken to the Circuit Court of Appeals. In that case the question of the illegality of the search and seizure was raised, just as it is raised here, and as in this case the Government there filed a libel. The Government in that case, as they are doing now, filed exceptions to the claim; and the Court—the District Court—there sustained the Government and said that we would have to go ahead and prove our right to file a claim and held that in having done so we were out of court. On the appeal the Court said, in reversing the case, "Assuming, for present purposes, the Court was right in applying in a forfeiture libel rule 25, as it did, a question which we do not decide or deem necessary to do, the practical effect of the procedure followed was to deny Cost an opportunity to assert under the original petition his right, if such he has, to a return of the liquor. We will therefore vacate the decree entered in the libel case below and remit the record with instructions to proceed in due course on the petition of Cost for the surrender to him of the liquors seized under the search warrant and now under the Court's control and to make such order as the proofs and facts warrant."

Now, that is the procedure that we have adopted here. We
148 followed that, I should say we have challenged the Government on the search and seizure here. There is no question before the Court here as to whether we have title to this liquor, whether we are rightfully in possession of this liquor. That can only come after the Court rules whether our motion on the search and seizure is right or wrong, and if the motion to suppress the evidence is granted on the ground that the search was illegal there is nothing left for the Court to do.

The COURT. Am I to understand from that, Mr. Halle, that anybody, any passerby, or anybody could come along and say, "I don't think that search and seizure was legal; I am going into court and set that aside"?

Mr. HALLE. No; the person in possession, the person in possession. He doesn't have to show ownership; all he needs show is that it was in his possession, and the Supreme Court and Circuit Courts and District Courts have ruled on that question. Your Honor is familiar with those cases. We don't have to prove title on a search and seizure. In fact, there are cases where owners have come into court to claim their property, claiming an illegal search and seizure. Take the Gallagher case; they held there that only the one in possession is the

one who can claim this constitutional right; in other words, his rights were invaded, property right in his possession and custody and control was searched and seized. There has been a case here by Judge Avis where that motion was made by a master in charge of a vessel. Similar motions were made by two masters in charge of two vessels in Brooklyn and the courts in the three cases have sustained the challenge that the search and seizure was illegal. That is what we come here now for.

The COURT. We are only at a point where we are discussing who must go to bat first, Mr. Halle.

149 Mr. HALLE. On that question——

The COURT. That is what I am interested in right now. The search and seizure may be attacked. You may develop the person that you say is the proper person, is the proper person to attack, but the question in my mind is, is the burden now placed upon the Government simply by the filing of a notice of claim by Mr. Rizzo and the notice of motion by his counsel, the answer, does that now place the burden upon the Government at this hearing on this motion to substantiate its search and seizure first simply by filing these papers.

Mr. HALLE. Yes, your Honor; and if your Honor will indulge with me for a moment I will demonstrate the position.

The COURT. All right.

Mr. HALLE. Now, in cases where there was a search warrant and the property is seized and the individual comes in and challenges the search warrant, now the procedure there is, from my experience, that the affidavits on which the search warrant is based are laid before the Court or the Commissioner, depending on who issued the warrant, then the challenger of this warrant has the right to call on the Government witnesses, the affiants, those who made the affidavits for the purpose of cross-examining on their affidavits. That has been the procedure on the search-warrant cases.

Now, here we have absolutely nothing. We challenge the Government on the search and seizure and the Government has not even put in a piece of paper of any kind to show that they are rightfully in possession, that this possession was based on a lawful search as a lawful seizure. Now, if they would submit such an affidavit it may be that they would not be required to call witnesses and rely on
150 their affidavits, but that would give us the right to cross-examine the affiants on the affidavits submitted, so that we would know where we are at. Now, as it is now supposing we are called upon to show that the search and seizure was illegal, we produce our witness, what can he testify to? All he can say is that he was in possession of this property and officers of the United States came upon it, opened it, and took it away. That would still not show to the Court whether it was legal or illegal. The only evidence that could be brought before the Court is evidence of the Government witnesses to show whether they acted in legal or illegal manner. It

is not our actions that are being challenged here; it is the action of the Government, and therefore the Government has to produce the witnesses, the Government has to bring forth the proofs either by affidavit or witnesses to say because we have nothing to answer, we are in this predicament, all we can show is we were in possession. That is not challenged. The question is did the Government go in there rightfully or wrongfully. It is a matter for the Court to decide. Surely our client does not know, cannot be asked to answer that question because all he can say is that the witnesses, that the Government officials were there and they broke open. We still don't know whether they did it by a warrant or not.

Supposing, for the sake of argument, your Honor, and surely we have no less rights here because there was no warrant than we would have if there was a warrant, supposing there was an invalid warrant on its face invalid, and we made a motion to dismiss the search because the warrant is invalid on its face; in other words, it is a warrant, the affidavits are so meager and so limited in recital of facts that a mere looking at the warrant and the affidavits would disclose
that there is insufficient on which to predicate a search. Would
151 we have to go forward with our witnesses? We proceed on
their warrant. We proceed on the affidavits annexed to their warrant. We claim on their warrant and affidavits there is insufficient.

Let us take that a step further, let us assume that the Court will rule that the warrant and the affidavits are sufficient. Can we have our right taken away to cross-examine the witness who made the affidavit to disprove his conclusions or his statements that he made in that affidavit?

Now, apply it to this case here. There is no warrant, there is no reason because of that that we could have less rights than if there were a warrant. Surely the Court's inquiry should be greater than where there is a warrant. We come into court here and say the property has been taken away from us. This Court can never know whether that search was legal or illegal unless the witnesses who have made the search are brought before this Court for the purpose of examination or cross-examination, or let us even say calling them as hostile witnesses, because otherwise the Court will never know whether or not this search was legal or illegal, and that the Government must sustain.

Mr. WEINBERGER. May I add a word, if your Honor please?

Mr. BESSON. Are two counsel to be arguing?

Mr. WEINBERGER. If your Honor will permit.

The COURT. Well, I will let them do it, Mr. Besson.

Mr. WEINBERGER. It is not a question of argument; it is a question of calling your Honor's attention to something that happened in this case. Your Honor will recall when the original application was made it was made on an order to show cause why property should not be returned and why as a matter of fact an order should not be

made suppressing its use in evidence in any criminal prosecution.

152 The COURT. No; just a moment. I think I can correct that a little bit. I think it was a bill in equity I objected to.

Mr. WEINBERGER. That is correct, sir, a bill in equity, I stand corrected, it was a bill in equity asking for suppression of evidence in a criminal prosecution as well as any proceeding involving Rizzo as a defendant.

The COURT. That is right.

Mr. WEINBERGER. I want to give your Honor the facts, and get to a question of law which I think is unanswerable.

Your Honor, as a matter of fact, thereafter I think your Honor will find in the original papers which were submitted to your Honor, in accordance with your Honor's suggestion it ought not to be a bill in equity, we had a provision in the order to show cause which your Honor struck out which I have here. The order provided that the collector, why he should not be restrained, " why a restraining order should not be issued by this Court, restraining and enjoining the said Philip F. Elting, as collector of the customs for the Port of New York, or any of his agents, servants, or representatives from in any wise using the said cargo or any of the subject matter contained on the said barge, or any information obtained by virtue of the said search and seizure against the said Frank Rizzo, or his agents or servants; and that the said cargo or any information obtained by virtue of the seizure of said cargo, and any of the subject matter contained on the said barge, should be suppressed as evidence in any prosecution against the petitioner herein or against any of his property; and it is further " ordered. Your Honor struck that out in the original order, which I should like to hand to your Honor,

153 and struck that out obviously for this reason, your Honor said then that you were desirous of establishing a definite policy of procedure in New Jersey in this district on the question.

Now, we get to the vital question involved here, is it the view of the Court or the United States Attorney that a defendant must take the stand in a case of this character to show an illegal search and seizure when admittedly without warrant, search warrant, they come into my admitted possession of a vessel, take me bodily and arrest me, and seize my cargo. Do I there have to show an affirmative case or is it compulsory, and as it would have been compulsory on an order to show cause which your Honor presented for them to show why or by what legal authority they did the acts which they claim.

Mr. Besson's point about establishing title may be a point where title is involved, but not where criminal prosecution is involved, and you are seeking to invade my fourth and fifth constitutional right of subject matter in my property which you propose to use in evidence against me in a criminal proceeding. To me that proposition is elementary; it is never done any different in this jurisdiction or any other in the United States of America.

I don't rely on the Cost case for that question. My rights are being invaded; you are seeking to use in evidence the 146,000 gallons of cargo, I say that was in my possession lawfully until by legal mandate you had a right to take it. They didn't do it here. We applied to your Honor immediately and asked your Honor for relief, for what, to the Government, why is it that you say that you had a right to arrest this man under the circumstances which existed in taking this man, as you did, or his property, as you did? I call on you to show cause, and as Mr. Halle very properly states the initial
154 proceeding would have been a complaint. There we could have seen the charge. That didn't exist here.

Now, I submit that in this case, because your Honor is only concerned with the one question, you are not trying title in a libel proceeding; your Honor is now taking the question of was there a legal search and seizure; is there evidence here which you have no legal right to use in a criminal proceeding against Frank Rizzo?

On that question surely we can't differ as to the legal consequences, and we say legally that the Government must assume in this posture of the proceeding the laboring oar of establishing the right to take, the right to seize, and the right to enter. Those are the questions that are germane to this issue and none other, and on that score they have the laboring oar.

Mr. BESSON. If your Honor please, counsel has covered considerable ground in this matter and I would like to revert back to the Cost case, as your Honor was familiar with that, I think, at the time it was argued. Nevertheless, I would like to refresh your recollection on several points.

In the first place, that case related to a seizure on land and the proceeding, of course, was partially in admiralty and partially under the rules of the exchequer; in the second place, in that case the default decree had been entered on the proceedings on the libel, and it was after the default decree that the claimants came in, having previously filed their petition, and asked for the reopening of the default decree. All that the Circuit Court of Appeals decided in that case was that the default decree should be opened, so that the petitioner Cost would have his right to have that question litigated, because the libel had been filed and the default decree taken after his petition for the restoration of the seized property had been filed with the Court.

155 Now, on that status of affairs that case does not decide anything more than that a default decree on a libel relating to a seizure on land should be opened, so that a question with respect to search and seizure might be litigated, and the Court went further in that case to point out specifically that they did not decide any question relating to the interpretation of admiralty rule 25 and its application to cases of seizure on land. They did not decide that question.

Now, this case involves an admiralty case, not a seizure on land, a purely admiralty case to which the admiralty rules are undoubtedly applicable.

Going back to the case of United States against 422 Casks of Wine in one One Peter's reports, it has been decided there more than one hundred years ago that the claimant in a proceeding of that kind must establish his local standing.

Now, I might call your Honor's attention to another thing in this case. Counsel has endeavored to make a point of the verification and that is nothing more than this, the verification of one of the proctors in this case of an answer. Now, they have filed an unverified answer; it has no status whatever in this proceeding because under admiralty rule 27 the answer must be verified by what the rule describes as the defendant, the defendant, of course, being the claimant who has come in and established his right to appear in the proceeding, having established that right he becomes the defendant. Now, they have filed an unverified answer. The United States of America does not have to file a verified libel because the admiralty rule says so and because it has been the practice for time immemorial for the Attorney General or the king's counsel, as it was in England in the Court of Exchequer or in the admiralty, to file it on his oath of office, because the oath——

156 The COURT. Yes; I was all through that, Mr. Besson.

Mr. BESSON. I know; but I am just calling that to your Honor's attention because the mere filing of a libel by the United States Attorney in this case has the same sanctity as a verified statement by the proctor, not the defendant but by the proctor.

Now, I submit that under the case of 422 Casks of Wine, which I have cited before, that the burden is on them to do two things—to establish their claim and to establish that there was an illegal search and seizure.

The COURT. Well, now, Mr. Besson, the situation is this, however, these people came to me with a bill in equity, as I recall it.

Mr. BESSON. A petition, your Honor.

The COURT. I think it was a bill in equity.

Mr. BESSON. It is labeled a petition.

Mr. WEINBERGER. Bill in equity which your Honor thought——

Mr. BESSON. I will show you the petition.

Mr. WEINBERGER. The Court is talking about the original proceeding. There was originally a bill in equity.

The COURT. Sometime ago.

Mr. WEINBERGER. Yes.

The COURT. On which the original order to show cause issued.

Mr. BESSON. It says petition and order to show cause. Then here is the petition.

Mr. WEINBERGER. Mr. Besson is right.

Mr. BESSON. Petitioner Frank Rizzo.

157 Mr. WEINBERGER. That is the one that was filed. Your Honor didn't want the bill filed.

The COURT. That is probably what happened.

Mr. WEINBERGER. Yes.

The COURT. On my suggestion then they filed a petition and asked for an order to show cause, and I directed that the cause proceed along these admiralty lines.

Now, Mr. Besson, suppose they had discarded their theory of recovering these things in admiralty; suppose they had simply filed a petition, and order to show cause was issued on that to determine the legality of the seizure—that is, a petition to suppress the evidence. They could have done that, couldn't they?

Mr. BESSON. Well, your Honor, there was no cause pending; there was no cause yet pending.

The COURT. Well, hadn't Rizzo been arrested?

Mr. WEINBERGER. Certainly he was.

Mr. BESSON. He may have been arrested; yes, sir; but it was not entitled in such a cause.

The COURT. No; I know they didn't do it. I don't want them to suffer now because I directed very mandatorily that the proceedings be in admiralty, because I thought in that way we could best dispose of the entire proceeding. Now, I don't want them to be penalized by my having directed the proceedings to follow a certain course. If they had open to them a remedy whereby they could have tested the seizure without answering a libel or without appearing in an admiralty cause. I don't want to deprive them of that remedy.

Mr. BESSON. Well, if your Honor please, supposing they had ignored the admiralty phase of this case and treated this merely as a criminal procedure.

158 The COURT. That is right.

Mr. BESSON. They would then, under the cases, have been obliged to establish that they had some claim or interest in the place searched or the property seized. That has been decided in the case of Armstrong against United States, 16 Federal, Second series; the case in the Ninth Circuit. The Supreme Court denied a certiorari in the case in 47 Supreme Court Reporter. That cites several other cases from the Circuit Court of Appeals, and they pointed out particularly, "Does the record show that the defendant made any claim either to the premises searched or the property seized—to base a constitutional right?"

Now, I think that has been decided repeatedly; that an intermeddler, an interloper, cannot object to the search of a place in which he has no proprietary right; and I think that it is part, I think that the burden of proceeding here is upon the claimant to establish his right; and, moreover, we are now proceeding not in a criminal proceeding but in a proceeding in admiralty. I mean that is what we are proceeding in now, irrespective of any misleading of the claimants.

The COURT. Yes; but——

Mr. BESSON. But if we were to treat it otherwise, nevertheless he would still have the burden upon him to allege before the Court—it might be that he might call Government agents to prove his case,

he might call Government customs officers, or he might call coast guard officers to prove his situation, but part of the thing he must prove is his status to act and to object.

The COURT. He says that if this were done by a search warrant he would have the benefit of the warrant and the affidavits. Of course, he has a libel; the Government furnishes him with a libel, setting forth the reasons for its seizure and the cause of action by
159 the Government. Now, of course, he doesn't know, presumably, as he would in the case of a search warrant, who actually made the seizure. I suppose the Government would be perfectly willing to furnish him with a list of the officers; I imagine you have them in court, haven't you?

Mr. BESSON. Oh, yes.

The COURT. Would that be satisfactory to you?

Mr. WEINBERGER. Yes; if they will produce evidence. All we want is to show that they did the right thing. If they are right, we are wrong.

The COURT. Mr. Besson suggests that, and I have sort of supplemented his suggestion by the offering to you of the names of the agents who made this seizure for examination here by you.

Mr. WEINBERGER. They may be examined?

The COURT. Yes.

Mr. WEINBERGER. Certainly, thank you; that is all we want; and then we can make an issue of it.

The COURT. All right. I think you would be entitled to that information.

Mr. BESSON. Yes; I will give them a list now.

The COURT. All right.

Mr. BESSON. Do you want to take these names down?

Mr. WEINBERGER. We will see the exhibits and cross-examine them; I mean just examine them.

Mr. BESSON. I am not going to offer them.

The COURT. What is that?

Mr. BESSON. I am offering to give them the names of the persons who are concerned in this search and seizure.

160. The COURT. What do they want?

Mr. BESSON. Now, they want me to put them on and examine them myself.

The COURT. No; he wants to examine them; he will call them as his witnesses.

Mr. BESSON. I will give you their names so you can call them if you will take a pencil and write them down.

Mr. WEINBERGER. Is your Honor going to charge them with the responsibility of making them our witnesses?

The COURT. I will allow you some latitude.

Mr. WEINBERGER. That is all we want. We want to show, your Honor, they can't justify it.

The COURT. All right.

Mr. BESSON. I ask, too, they be required to produce Rizzo and show that he has some status or interest. I don't see how they are permitted to abstain from producing him and showing his interest in this proceeding. How do we know that he is even present at this proceeding?

Mr. WEINBERGER. Supposing Mr. Weinberger took the stand and showed where this man bought everything and he had title to it, couldn't I use that method—couldn't I if I wished to?

The COURT. No; I don't see how you could.

Mr. WEINBERGER. Why not show title through other channels than an individual himself?

The COURT. I think, after all, we have got to address ourselves to the libel proceedings for the moment.

Mr. WEINBERGER. Yes.

161 The COURT. If I feel I have deprived you of any rights by insisting on the admiralty proceedings, I am going to give you ample time to bring your proceedings in any other way.

Mr. WEINBERGER. Thank you.

The COURT. So we will dispose of that. You need not be worried about that. But in this admiralty proceeding Mr. Rizzo is an intervenor; he is a claimant.

Mr. WEINBERGER. True.

The COURT. The proceeding is one in rem, against the thing itself. I think there are decisions that hold that there must be a showing of bona fides, good faith, in the claim of the person intervening in the libel proceedings, in the admiralty proceedings.

Mr. WEINBERGER. I think your Honor is right undoubtedly, but may I say to the Court——

The COURT. I don't know that the simple statement by a man named Rizzo——

Mr. WEINBERGER. May I say you are only right in certain cases. There are lots of cases on that. The only questions involved here under the authorities are these questions, first, was there a legal search and a legal seizure. The question of ownership does not become germane.

The COURT. Mr. Besson insists, and I think with a certain amount of force, that any passerby, any intermeddler, as he calls him, cannot attack the search and seizure made by the Government, no matter how erroneous it was.

Mr. WEINBERGER. That may be so, but I say that is not the law.

The COURT. Let us see what the law is on the subject.

162 Mr. HALLE. If I may answer your Honor on that subject——

The COURT. Yes; what is it?

Mr. HALLE. In the admiralty proceeding the claimant, of course, filed his notice of claim and sets forth that he is the owner or possessor, whichever he wants to; in fact, he does not have to be the owner; a captain of a ship can file his claim to the cargo and boat and everything and he has been sustained.

The COURT. All right.

Mr. HALLE. All right. Now, that being so——

The COURT. When he does, Mr. Halle; when the captain of the ship files his claim against the libel, isn't it necessary for him to substantiate that status of possessor at least or whatever his status may be?

Mr. HALLE. As I read the authorities, I think that it is up to the Government—I have read the Cask of Wine case and the other case, a few times—it is up to the man challenging the right who must come forward with facts to sustain his challenge. He simply cannot say you have no right to this claim, you have no right to make it, you cannot do that. He must sustain it with something besides his challenge. That is what the cases hold. Now, in other words, the Government comes here and says we have no standing here because we are interlopers. Well, there are some things this Court must take judicial notice of, and that is Rizzo was arrested and that is that there is a case pending against Rizzo, whether before this Court in papers right now makes no difference. The Court always has the right to inquire into its records and they are always before the Court. Rizzo is charged with—they are charging him that they found him in possession of this cargo. Now, they say that Rizzo is an interloper. If he is, why did they arrest him? They have got to stand
163 on one foot or the other. They cannot say one thing in that case and another here, and if they come here they must give the Court in addition some facts to substantiate them that Rizzo is not the one in possession.

The COURT. The thing that I have got to take into consideration is the allegation made by Rizzo himself over his own signature, that at the time of the attachment thereof the said Rizzo was and is the true and bona fide owner of the said 146,000 gallons of alcohol, and that no other person is the lawful owner thereof, under his oath.

Mr. HALLE. Yes; your Honor; if I may answer that. Under the rulings made while it says at the time of the attachment that goes back to the original seizure.

The COURT. Yes.

Mr. HALLE. The authorities have held time and again that all goes back to the original seizure, so that in pleading and effect and law we have alleged that at the time of the seizure we were the bona fide owner and in possession of it.

The COURT. That is right, and as a matter of fact on the twenty-third day of December he was the owner and presumably subject to the Government's jurisdiction.

Mr. HALLE. May I say this, sir; let us assume for the sake of argument—Mr. Besson is talking about admiralty and I will meet him on the admiralty side of the case—that the United States was not a party here because after all the United States is no different before this C urt.

The COURT. Yes; as Judge Bourquin said, "Just one of the litigants in my court", when I had the honor to represent the United States. [Laughter.]

164 Mr. HALLE. So we are here on an equal footing. Supposing a private litigant came into court on a notice of claim and filed an exceptive allegation to the ownership without a fact substantiating that allegation. How long would he stand before the court with that exceptive allegation? The Court would say to him, "What have you got here, do you mean to say because you are going on a fishing excursion here in the hope that this man might not be able to prove he is the owner or possessor that you can get away with it here? Oh, no; give me something, every litigant must walk into court with something. They are coming in here with a statement and all those cases. The Cost case and the Peters case and about half a dozen others—I have them here—have all ruled—that is my interpretation of it, maybe others will feel differently, but in my humble opinion they rule that the challenger must come into court with something else besides that. It raises an issue, it is true. Well, he raises the issue; he claims that we don't own it. He claims we were not in possession. Well, he ought to know that. He should come into court with that and show it to the court.

The COURT. No; he will probably advance, not to usurp your right to make your own arguments, Mr. Besson, but it strikes me that he will stand on this proposition, he alleges affirmatively that he rightfully made a certain seizure of certain things on such and such a day, and he will have to stand ready to prove those allegations on the oldest of theories of law, that he who alleges must prove. On the other hand, you allege that you are the claimant of these articles, that you are intervening with your claim on the ground, among others, that the search and seizure were illegal, and he will take the stand that that being something that you allege you ought to prove.

Is that right, Mr. Besson?

165 Mr. BESSON. Well, yes; except this that under the cases, if I have not misunderstood your Honor, that he must establish first that he has a right, that he must establish where there is an exception to the claim that he has a right to claim the property. Now, your Honor must consider that under the admiralty rule both the claim and the answer are verified. The libel is in effect verified because it is a libel by the United States of America.

The COURT. Yes.

Mr. BESSON. But the answer is not taken as confessed, because it has to be verified. Of course, in this case the answer is not even verified that has been filed, but the answer is not taken as confessed because it is verified; neither is the claim. The admiralty rule gives the right to the libellant to file his exceptions within four days, and if he fails within the four days to file those exceptions, then the allegations of the claim go by default, but if the exceptions are filed within the four days, which they have done here, then the burden is on the claimant to prove. All we ask is to have Rizzo here and let him go on the stand. Why should he hide away? Where is he?

Mr. WEINBERGER. Here he is [indicating].

Mr. BESSON. Let him come before the Court.

Mr. WEINBERGER. I thought Mr. Besson knew he was here.

Mr. BESSON. No; I didn't; I thought he was away.

Mr. WEINBERGER. There he is right there without his 146,000 gallons.

Mr. HALLE. In answer to Mr. Besson's contention I am afraid we are going a little bit far from the point. The Circuit Court for this circuit has ruled definitely on the question of the exceptive allegations to the notice of claim. The Circuit Court in the Cost
166 case has said, and I will read now in addition to what I have read before—and, by the way, it was not, if I may take issue with my friend, it was not a default decree; it became a default decree when the Court said we have to go on with the burden of showing that we were in possession of it, that we were the rightful claimant; we could not go on and we stopped and naturally the decree was entered by default. That is what happened. Here is what the Court said, "Instead of following the course so outlined, Cost on May 16th filed a petition to intervene as a claimant in the forfeiture libel"; in other words, instead of going on with his motion to suppress, prosecuting his motion to suppress and for return of the liquor on his order to show cause after the libel was filed he appeared in the libel proceedings, as we have done here, "and filed an answer and motion to quash, at the same time challenging the jurisdiction of the Court, and again prayed for the return of the liquor to him. Following this, the United States Attorney on December 7th filed exceptions to Cost's answer on the ground, inter alia, that 'the said claim failed to state that the claimant is the true and bona fide owner of the res, as required by general admiralty rule 25 (set out under 28 U. S. C. A., Sec. 723)'; and, second, 'because the claim fails to state that it is made on behalf of a person who is the true and bona fide owner of the res, as required by general admiralty rule 25.' This contention was sustained by the Court, and the decree of forfeiture entered from which Cost took this appeal."

Why in the world did the Circuit Court of Appeals reverse this judgment if they did not believe that the ruling of the Court below was an error, that the Court below had no right to compel us to answer the Government's contention to prove that we are the proper claimant, and to prove we have the right to make this claim. Oh, no; the Circuit Court said:

167 "Assuming, for the present purposes, the Court was right in applying in a forfeiture libel rule 25, as it did, a question which we do not decide or deem necessary to do, the practical effect of the procedure followed was to deny Cost an opportunity to assert under the original petition his right, if such he has, to a return of the liquor."

Now, it makes no difference whether it is on land or water. The Fourth and Fifth Amendments go to all the land areas of the United States and all the arms of the sea and a marginal belt of three miles. In 108 U. S. the Cunard case so decided.

The COURT. Suppose you leave out for a moment, Mr. Halle, the admiralty proceedings, and apparently in the Cost case there was that dual procedure as well.

Mr. HALLE. Yes.

The COURT. Suppose there is a petition here to suppress the evidence on land and return the goods seized, and we will take, for instance, that Mr. Rizzo is the person who applies in that petition. Mr. Besson makes the point, as I understand it, that even then Rizzo would have to make satisfactory proof that he had the right to those goods, otherwise he could not object to the unlawful seizure, so that it is a half dozen of one and six of the other.

Mr. HALLE. I don't believe so, for this reason, if a man is arrested and they take his property away or property in his possession away, it would be an awful situation if in trying to assert his rights under the Fourth and Fifth Amendments with a prosecution pending against him he would have to take the witness stand to prove that his rights were violated. That I maintain is the province of the Government, no one knows whether that seizure was right or
168 wrong and no one could ever decide whether that seizure was right or wrong until the Government's witnesses are heard or the Government's affidavits are heard, and that is just what the Court said in the Cost case because the Court in the Cost case said that the practical effect of the procedure followed was to deny Cost an opportunity to assert under the original petition his right, if such he has, to a return of the liquor. "We will therefore vacate the decree entered in the libel case below", there is no question right now about the ownership of the liquor, title in it or anything. The only question is was the Government right or wrong in making this search and seizure and this arrest. That is the only question.

The COURT. That is what you say but Mr. Besson—we are arguing around in circles—says the first thing you have got to do is to prove your right to intervene at all here.

Mr. HALLE. I am only following the Cost case.

The COURT. Isn't that so, Mr. Besson?

Mr. BESSON. Yes.

The COURT. What have you got on that, Mr. Besson, to support you? Let me see the Cost case, will you?

Mr. HALLE. Yes [handing book to Court].

Mr. BESSON. I would like to reiterate with respect to the Cost case that it was a seizure on land and therefore on the exchequer side, and that the Court did not and specifically avoided passing on rule 25.

Mr. HALLE. In the Carroll case, the United States Supreme Court says there is no distinction between land and sea, and it has been followed in a number of other cases by the United States Supreme Court.

169. The COURT. I don't think, Mr. Besson, the academic discussion of whether there is any distinction between a seizure of land or sea is going to make a lot of difference here, in view of the

form these proceedings have taken. They are here because of my direction that they come into a court of admiralty. Now, if they have better and larger rights by filing a petition for the suppression of the evidence and the return of the goods, then I don't want to deprive them of those rights. You can understand that.

Mr. BESSON. Yes. Even if they are proceeding on such a petition there is no such petition now before the Court. There is a motion to dismiss supported by a verification of the answer filed in this case, not a verification by the defendant but a verification by one of the attorneys.

The COURT. Both sides seem to think this is going to be on final hearing of the libel proceedings.

Mr. BESSON. No; as a matter of fact, it might result in submitting a great deal of the evidence that would be on final hearing.

The COURT. Certainly it would. When, in fact, all that this should be is an attack upon the libel.

Mr. WEINBERGER. Your Honor very properly stated—I have just given your Honor again the background that prompted filing what we did, the original cause was entitled in the case of the United States of America v. Frank Rizzo. Your Honor will find it was by verified petition. We submitted the order to the Court and that verified petition alleges he was the owner and specifically sets forth the ships on which we intervened and asked the order to show cause. Your Honor thought then the proper proceeding would be a motion to suppress in the libel cause and therefore permitted the United
170 States Attorney forthwith, that is within ten days, to file a libel and bring the matter on in the usual form in admiralty.

Going back, if in fact legally, we had a right to suppress the evidence which would force and compel, as the language is—I am not familiar with the Cost case, but with the law on the question of suppression of evidence, and so is your Honor, certainly a defendant does not have to take the stand against himself when the Government is called upon in a proceeding which it seeks to condemn, there is the word "condemn" property, when you are taking my property, which admittedly is in my possession, should I prove it is my property? On its very face it would be clearly—I am going to use a strong term, almost asinine, sir, to force a defendant, a defendant in possession, mark you, in a condemnation proceeding instituted by the Government without due process as in this case. They did it without probable cause, without a warrant. I support my property right. I never heard of it.

The COURT. On the other hand, Mr. Weinberger, what is to stop anybody from coming in and claiming the property?

Mr. WEINBERGER. When you get to the point of title may I say this to you, answering your Honor's question in an admiralty case, Mr. O'Donnell, and my friend here, Mr. Halle, say the rule is in admiralty——

The COURT. You forget Mr. Kessler.

Mr. WEINBERGER. We are only Jerseyites; we are not in that class.

The COURT. All right.

Mr. WEINBERGER. What I want to say to the Court is this, in admiralty can it not be that both the claimant and the Government may not succeed in the admiralty and some other third party come in and get the goods? Isn't there such a situation? That is absurd
180 even in admiralty. They can both walk out without getting the merchandise. He is the property owner. But I say this to the Court as between an official claiming the right to arrest and a seizure you must affirm and establish before you have a right to confiscate. This is a condemnatory proceeding. You are taking my property and seeking to use it as evidence against me; you haven't got a right to do it. You break into my home and take my evidence and use it against me. Am I supposed to take the stand and show where I stole it if I did? It would be a nice state of affairs in this country! I am not saying there are not so many people who could not account for their merchandise. On the face of it, you can see it would be an invalid order. The Government never, in my opinion, in any proceeding has a right to say to the defendant you go and prove; when you condemn, the laboring oar is on the Government.

Your Honor asked Mr. Besson the question in the case of Lager beer; I didn't know they had it one hundred years ago—wine. Sir, in that case surely the question of the third and fourth constitutional provision was not involved in the defendant being arrested and taking his property and then having procedure instituted by him in which he says plainly, you have taken my property and arrested me. I want you to be suppressed from the use of that evidence. Must I not prove the case, or must your Honor say to them, as the law is, the Government has seen fit to confiscate here and retain? That is your proof now, your obligation; you stepped in there and took. The charge is made you had no warrant, no process, obviously. It looks so plain to me, if I could just make it as clear as I see it. You are taking my property.

The COURT. All right. I think I have gotten as much as I possibly can.

172 Mr. HALLE. One further observation. In the libel proceeding, your Honor, the Government must allege a lawful seizure; it is predicated on the lawful seizure, this libel; and it must be in this case a seizure by the collector. Of course, the coast guard or customs makes the seizure; any other department comes within his province; he adopts the seizure. We are challenging right now preliminarily that this seizure was lawful; that they lawfully boarded and searched this vessel. That is what we are challenging.

Mr. BESSON. They have got to have the status to make the challenge.

The COURT. The point that Mr. Besson raises is this: it is entirely preliminary, he says, that in order to come in and challenge the Government's right, somebody has got to substantiate his claim to the property. Now, then, you say Frank Rizzo has done it in this case by filing his sworn claim. Now, Mr. Besson says that is not sufficient; he ought to prove his allegation of ownership. Now, the

question is, it all simmers down to this—is it sufficient for the claimant in a libel proceeding or the petitioner in a seizure on land to simply swear on paper that the goods were in his possession or that he was the owner of them and that they should be returned to him, and that is the question; that is the simple question.

Mr. Weinberger, you were out of the room; I say that the simple question, the issue here is this: is it sufficient for the claimant in an admiralty proceeding or the petitioner in a proceeding to suppress evidence by petition—is it sufficient for him to simply make the allegation in writing or, as Mr. Besson charges, is it necessary for him to prove substantially that he is actually the person entitled to function, or is the simple statement written down, sworn to, possibly sufficient to get him into court? That is the whole question here.

173 That is the only question. Mr. Besson says that is not enough. Isn't that right, Mr. Besson?

Mr. BESSON. Yes, sir; and I call your Honor's attention to the further ground that the collector or the seizing officer has a right to know who really is the owner of the property if such be the case or the intervenor who may claim a lien upon it, because he is chargeable to some one if it should be returned improperly.

The COURT. And it is a fact, to my personal knowledge, that in numerous proceedings the mere sworn claim of the claimant in admiralty proceedings and the verified petition of the petitioner in causes to suppress evidence has been regarded as sufficient to throw the burden of proof on the Government to show the lawfulness of the seizure. I have seen it done a hundred times in the court room.

Mr. WEINBERGER. We had it the other day in the Lido Venice case.

The COURT. But I have always felt there was a grave question as to whether anybody could come in and swear to an application.

Mr. KESSLER. There are two questions involved on this preliminary motion. I am interested in the result of this because I suspect the result of this will influence the other cases.

The first question your Honor is called upon to determine is the question of the lawful seizure. That is one question separate and aside from the next question.

The COURT. No, no. The very first question is, as raised by Mr. Besson, who has a right to question the seizure.

Mr. KESSLER. I am coming to that. Your Honor has sug-
174 gested—personally I don't know the rule in admiralty—but I know it when you move to suppress. Your Honor said if the admiralty rule is narrow you are going to broaden the proceeding out to cover whatever rights the defendant may have. In this case there is a defendant who is charged with a crime. He comes, he is not a mere stranger, he comes and says, "I desire that this evidence be suppressed:" Now he says, "I desire it to be suppressed." That is one question. After you decide that, and that is done on a verified petition as your Honor suggested, now he stands by and makes the Government prove, but the second question—there may be a question

whether he is entitled to recover the goods even if your Honor suggests the evidence be suppressed, that does not necessarily follow as a corollary that he is entitled to it. On that question Mr. Besson may or may not be correct. He may say now, prove you are entitled for the Government to turn over to you. That is another problem, but the first question to be determined is the question of the lawful seizure, and he comes as a defendant, not as a stranger.

Mr. BESSON. I would like to call your Honor's attention to the further fact that we have in this district, admiralty rules which are adopted by this Court supplemental to the United States Supreme Court rules and under authority of that.

The COURT. Yes.

Mr. BESSON. And I refer your Honor to rule 20 as it is stated in Benedict on Admiralty, fourth edition. I have a copy of the rules upstairs.

"A claim or answer may be filed at any time after the service of process and before default entered. The claimant may except to the libel," and so forth, and then it further says, "The libellant may except to the claim or answer for insufficiency or indistinctness
175 within four days after the same is filed, and the party claiming or answering shall give two days' notice for hearing such exceptions for the earliest day of jurisdiction thereafter, in default whereof the exceptions shall be considered allowed." That indicates right away on the face of it under the rules that the Court contemplates the passing on the question of the claim and the validity of the claim as a preliminary matter, and in fact, you have got to defy the rule that is laid down in United States v. 422 Casks of Wine if you decide to the contrary.

There is a case of United States against Vandervoort which cites that case of 422 Casks of Wine.

The COURT. That is North Carolina against Vandervoort.

Mr. BESSON. Yes, sir; but the case I rely on is the case by the United States Supreme Court, the case of 422 Casks of Wine. I haven't it here available; it is one Peters report. Would your Honor like to have it brought up so you can refer again to the language of it?

Mr. HALLE. I don't think we need that.

Mr. BESSON. I think that absolutely is important, and I would like to read the language of it to your Honor.

The COURT. All right, get it from my office.

Mr. HALLE. We have not reached that stage here because the Cost case ruled on all fours with the question involved here, and said that the District Court was in error in compelling us to go forward to prove our claim.

The COURT. Listen to the syllabus in the Cost case, Mr. Besson. This is our Circuit, of course. I think we were both Assistant United States Attorneys at the time of this case.

176 Mr. HALLE. I was in that case, your Honor, but my name does not appear here.

The COURT. I am afraid it is a little too late to correct that.

"Where court, in libel by United States to forfeit intoxicating liquors alleged to be possessed and used for barter and sale, in violation of act October 28, 1919 (27 U. S. C. A.) rightfully restrained all proceedings for forfeiture until determination of claimant's petition to quash search warrant under which liquor was seized and for return of liquor, but claimant, instead of awaiting determination of such petition, intervened as claimant in forfeiture libel, resulting in a decree of forfeiture on ground that claimant failed to state he was bona fide owner of res as required by admiralty rule 25 (Set out under 28 U. S. C. A., Sec. 723), held, that decree will be vacated as denying claimant opportunity to assert his right under original petition to return of liquor."

Now, Mr. Besson, we will have to regard these people as having the same status as Cost in that they have an application to suppress the evidence the return the liquor. They have not, but it is my fault that they have not, because I ordered them not to; I ordered them to proceed in this line. Now, in this case it apparently—this was an admiralty proceeding.

Mr. BESSON. It was a proceeding in the Court of Exchequer.

The COURT. Yes. It was governed by admiralty proceeding because the Court refers——

Mr. BESSON. In part at least.

The COURT. To admiralty rule 25, and it directs the District
177 Court to not proceed. In the event that you insist on it, I will adjourn the libel proceedings and let them proceed with a petition to suppress the evidence; let them file such a proceeding and according to the mandate of the Cost case, which, after all, is the law of the Circuit. Then, however, you will strike the same impasse, because I assume you will make the same objection.

Mr. BESSON. Yes, sir. I will under the rule of stare decisis, in passing on what a case decides the Court should not go any further than what was actually decided in that case.

The COURT. Yes.

Mr. BESSON. In that case there had been an order made by the Court prohibiting the filing of a libel, in some way through some lack of coordination a libel was filed. It might have been that the filing of such a libel was a contempt, but at any rate a libel was filed and a default decree was entered.

The COURT. And they tried to defend on that libel and apparently the same impasse was reached there as here, and Judge Runyon must have had——

Mr. BESSON. Judge Rellstab.

The COURT. Or Judge Rellstab must have said if you don't want to take the stand and say these are your goods I will enter a default decree against you.

Mr. BESSON. They did something else in that case. They didn't file a claim at all alleging that they were the true and bona fide

owners; Cost didn't say, didn't file any claim, he didn't say he was the true and bona fide owner of the goods.

Mr. WEINBERGER. We did more here, Mr. Besson.

Mr. BESSON. He didn't allege he was the true and bona fide owner. The point that the Court decided in that case is this, that the
178 Court having made an order restraining the Government from proceeding in any forfeiture proceedings or any other proceedings until the question arising on the pleading had been decided that no such proceedings could properly take place, and that the petitioner having acted promptly was entitled to have that question passed upon, and the Court went on further, as I recall, and said that they would absolutely refrain from expressing any opinion as to the applicability of rule 25 to that case.

The COURT. That is right. So that every one apparently up to date, with the exception of these very old cases, has slid out of making any definite pronouncement as to how far a claimant must go in proving his right to the goods when he alleges there was an unlawful search and seizure.

Mr. BESSON. Then you get to this case of United States against 422 Casks of Wine, and I would like to read part of that to you.

The COURT. All right, go ahead.

Mr. BESSON. This is page 548 of one Peters' reports.

"The second ground is that Messrs. Hazzard and Williams, in whose behalf the claim in this case was interposed, are not the real owners of the wine under seizure, but the same was owned by one Charles Hall; so that the claimants are not entitled to any judgment of restitution."

The COURT. How was that set up, Mr. Besson, in that case.

Mr. BESSON. It will tell you here, your Honor.

The COURT. All right, pardon me.

"This objection is founded upon a mistaken view of the time, nature, and order of the proceedings proper in suits in rem,
179 whether arising on the admiralty or exchequer side of the court. In such suits the claimant is an actor, and is entitled to come before the court in that character only, in virtue of his proprietary interest in the thing in controversy; this alone gives him a persona standi in judicio. It is necessary that he should establish his right to that character as a preliminary to his admission as a party, ad litem, capable of sustaining the litigation. He is, therefore, in the regular and proper course of practice required, in the first instance, to put in his claim, upon oath, averring in positive terms his proprietary interest. If he refused so to do, it is a sufficient reason for a rejection of his claim. If the claim be made through the intervention of an agent, the agent is in like manner required to make oath to his belief of the verity of the claim; and if necessary, he may also be required to produce and prove his authority before he can be admitted to put in the claim. If this is not done it furnishes matter of exception, and may be insisted upon by the adverse

party for the dismissal of the claim. If the claim be admitted upon this preliminary proof, it is still open to contestation, and by a suitable exceptive allegation in the admiralty, or by a correspondent plea in the nature of a plea in abatement, to the person of the claimant, in the exchequer, the facts of proprietary interest sufficient to support the claim may be put in contestation and formally decided. It is in this stage of the proceedings, and in this only, that the question of the claimant's right is generally open for discussion. If the claim is admitted without objection, and allegations or pleadings to the merits are subsequently put in, it is a waiver of the preliminary inquiry and an admission that the party is rightly in court and capable of contesting the merits. If, indeed, it should afterwards
appear, upon the trial, even after the merits have been disposed
180 of in favor of the claimants, that the claimant had in reality
no title to the property, but that the same was the property of a third person who was not represented by the claimant, or had an adverse interest, or whose rights had been defrauded, it might still be the duty of the court to retain the property in its own custody until the true owner might have an opportunity to interpose a claim and receive it from the court."

The COURT. Well, now, under that case, Mr. Besson, Mr. Rizzo will say I have sworn that the goods are mine.

Mr. HALLE. That is what Judge Dickinson ruled.

Mr. BESSON. If your Honor refers to the old system of common law pleading, the last kind of pleading put in would be a plea in substance, there were dilatory pleas, a plea in abatement was a dilatory plea, it was a plea not to the substance of the cause, but it was a plea to the person. An exceptive allegation is in the nature of a dilatory plea, and it challenges at the outset the right of this man.

Our rules in New Jersey provide the method by which that question should be considered and say if the claimant to whom these exceptions, to whose claim the exceptions have been taken, neglects to come in within two days and give notice for the next day of hearing why allegations of the exceptions are taken as proven against him and his claim is dismissed.

As a matter of fact, I don't know whether this could be considered such a day, but exceptions have been on file for several days, and I mean you can't get away from that proceeding. They can't by some sleight of hand escape the responsibility that falls upon them.

The construction that has been given the fourth and fifth amend-
ments has been, you might say, the place of refuge for the
181 criminal, and I think the right to escape through that door
should be as limited as the law will permit. There is not a state in the union that has adopted the rule that the Federal courts have adopted.

The COURT. You are going to precipitate a lot of oratory.

Mr. BESSON. No; I am not going into a lot of oratory.

The COURT. These are well-known defenders of the fourth and fifth amendments of the constitution, as you well know.

Mr. BESSON. I don't want to smite the rock. [Laughter.]

All that I do want to point out is that where a man comes in and claims the benefit of the fourth and fifth amendments he should at least establish primarily his right to make such a claim, and I think that that is true both in an admiralty proceeding and in a proceeding on a petition, for the reasons that were stated in the opinion that I cited to your Honor, an opinion in 16 Federal, second series, in the Ninth Circuit, that went up on certiorari in the Supreme Court. The case that I had in mind, I think your Honor is familiar with this question, having considered it many times, Armstrong against United States, 16 Federal 62 at 65, it says: "Nor does the record show that the defendant made any claim either to the premises searched or the property seized"——

The COURT. We hurdle the very simple question; we don't answer it; is the verified, the sworn, statement of Rizzo sufficient to give him the ground to attack the Government's seizure?

Mr. BESSON. I say no; I say no; it would if it were not chal-
182 lenged, and standing unchallenged it would be sufficient, but having been challenged it is in exactly the same position as our libel. Now, our libel standing unchalleneged would support a default decree. Were there no claim entered and the mere libel filed, it would be sufficient to support a default decree, but the rules provide a method of challenging the claim, and that method has been availed of by the Government and the claim has been challenged, and then the New Jersey District rules provide a further method of bringing that on for a hearing.

The COURT. That is true.

Mr. BESSON. And it is a preliminary question.

The COURT. All right; now, then, what do you want to do? Do you want Rizzo to take the stand and submit himself to a wide-open cross-examination?

Mr. BESSON. I don't say I think that he goes no further in his cross-examination than is necessary to allege his ownership.

The COURT. That is what he has done under oath here.

Mr. BESSON. I have a right to examine that.

The COURT. If he has sworn falsely here, you have a right to various remedies, or at least one very well-known remedy, because this is a material allegation in the proceeding.

Mr. BESSON. Yes; but I should also have the right in this case; I mean to have him establish that as well, because he may be proceeded against for perjury doesn't mean I should be deprived of the right to challenge that in this court. It would be just as ridiculous, I think, to say because a man filed an answer, verified, that the Government was absolutely bound by the allegations of the answer and could go no further. Now, that is not so.

183 The COURT. No; you could——

Mr. BESSON. We are not estopped by either the claim or the answer.

The COURT. No; Mr. Besson, you can then prove affirmatively that he is not the bona fide owner.

Mr. BESSON. That is the thing I challenge because I don't think we have, and I say because he is an actor, as the Court says, that we are obliged to prove that affirmatively.

The COURT. But the Court says there that his substantiation for his intervention shall be his plea that he is the owner, in that one Peters case you read me.

Mr. BESSON. Yes.

The COURT. Now, he has done that. Now, isn't it up to the Government to make some showing that he is not the owner.

Mr. BESSON. No; we deny that.

The COURT. Then you have got to prove what you allege.

Mr. BESSON. No; we are in the same position where we would be under the old common law pleading if a plea in abatement had been filed and we filed a general issue on the plea in abatement and the case went to hearing. Of course, strictly, under the old rules, there would be only one question before the Court, the question of the right of the person under the allegations of the plea. Now, the burden of proceeding would be on that party, because that is the party who makes the allegation. The allegation is, I own the property and therefore I have the right to be here. We say you have no right to be here because you don't own the property and I can't see under these authorities or under the rules how we can be deprived of
184 that. I think I can submit authority to show beyond peradventure of doubt that either the common law pleading or under such an allegation as this that the burden is upon the claimant.

The COURT. Now, Mr. Besson, suppose this were the ordinary petition to suppress, would you make exactly the same argument?

Mr. BESSON. I would make that point, your Honor; with due deference to your Honor, I think I was present in court the other day where your Honor called upon Mr. Pearse to establish at least the facts under the petition.

The COURT. Yes; that was because there was no verification at all; it was just a petition by Mr. Pearse as attorney to suppress the evidence.

Mr. BESSON. I think Judge Avis has been deciding, I have been so advised by Mr. Worth, that it was incumbent upon claimants of goods to establish their ownership before they were permitted to proceed, and I would like your Honor to examine the text in the cases which I have cited.

The COURT. Well, how do you get away from this claim under oath, "I am the bona fide owner." What more can you ask him to do? That was Judge Avis' idea. They were coming in, Mr. Worth, on petitions without claims; isn't that so?

Mr. WORTH. No.

The COURT. No claim was filed at all?

Mr. WORTH. No; I don't think so. I think they did file their claim.

The COURT. What did Judge Avis do?

Mr. WORTH. He compelled them then to go further to prove
185 that they were the rightful owner and had a right to that, and then it was incumbent upon the moving party because they make a motion to dismiss to submit witnesses to prove the illegality, after the first step was proven of the claim then they proved the legality of the search and seizure.

The COURT. What case was that?

Mr. WORTH. Several cases in criminal cases where they being the moving parties they were compelled to place their witness on the stand first. We have had several of them in Camden. He cited the Taylor case, that it was only the owner who had the right to come into court and claim and he had to show that he was the owner. If it was an ordinary employee of the owner, he had no status in the court.

Here I might add to Mr. Besson's argument, if your Honor will permit, that the reason that the Court should take into cognizance the rules set forth in this district under the admiralty that where an objection is set up by the opponent, then it is incumbent upon him to prove or set forth his claim within two days that it is correct or otherwise they are considered to be as stated in the objection.

The COURT. That certainly cannot apply. I am considering this matter from the standpoint of a motion to suppress evidence. Certainly that can't apply to an ordinary motion to suppress evidence.

Mr. WORTH. Well, they are the moving party and being such it is incumbent upon them to proceed with their proof.

Mr. BESSON. If the Court please, I would like not argumentatively to ask this question, how can the status of a person to come before the Court and object to the right to search be established; is the Government to be deprived of the right to cross-examine the
186 person who makes that statement under oath? Is the Government to be deprived of any right in the matter; is it to be concluded by a mere allegation in writing? Now, I say that under those cases if that were so then those cases would be virtually meaningless. The petitioner would have established his right and we would have no right to proceed whatever.

The COURT. No; the order of proof would appear to be here that the claimant has filed what on its face is a fulfilment of the requirements, namely, that he swears that the goods are his. He then proves the unlawfulness of the seizure. Then if you can attack his ownership I should think, I have no question in my mind, that you may be permitted to do that in the same proceeding, but they take the position that having sworn that the goods are theirs, that they won't lay the claimant open to a wide cross-examination for you to prove that it is not his property through the cross-examination of the claimant.

Mr. Besson. Well, there is something peculiar about this situation: in the first place, it is alcohol that is involved in this seizure.

The Court. Yes.

Mr. Besson. The transportation of alcohol normally, and it is alleged to have been an unlawful transportation or an unlawful possession in the indictment or in the libel, is not lawful, and therefore there should be some allegation, I think, or some proof to show that this possession came within some of the exceptions under the statute or that it was a lawful possession or that it was something he would be entitled to. I cite that Vandervoort case in that respect also, because there there was a cask of whiskey which was not Government stamped or labeled as required by law, and in that case the Court decided that that was immediately forfeited to the United States;

187 that it became the property of the United States because of the violation of those restrictions, and therefore it was something to which no claim could have been filed at any rate. That question has been raised on the exceptions to the libel.

The Court. All right.

Mr. Besson. How can this claimant escape the decision of those questions?

The Court. All right, Mr. Besson. Now, the witnesses are here and we have talked some two hours and I will admit that the drawing out of the proceeding is probably due to the ineptitude of the Court, but there has been, for the first time in my experience the question has been raised directly as to how far the claimant has to go. So that we won't lose the benefit of being here this afternoon, you don't want to come back here again for testimony, I am going to ask you to give them the list of your witnesses, Mr. Besson, and let them direct their examination toward the unlawful search and seizure, and then I will consider the legal questions involved after I have had the testimony. After all, it is not a jury proposition, it is purely an argument, and all of you can save what exceptions you want. Eventually you have got to get down to a point.

Mr. Besson. We are still proceeding in the admiralty proceeding and I may have my exception?

The Court. Yes.

Mr. Besson. If your Honor should rule against me, and it will be sufficient in point of time to make the application for that exception when your Honor has finally decided this case.

The Court. Yes.

Mr. Weinberger. So the record may disclose I want to give Mr. Besson all there is in the case, we served on the United States Attorney the petition and order to show cause which was allowed

188 by your Honor in which Frank Rizzo is the petitioner, files a verified petition, and so forth, in accordance with your Honor's discussion here.

The Court. Mr. Besson, is there any harm in our considering this application also as the petition to suppress the evidence?

Mr. BESSON. Yes; I would like to have the privilege, I mean if there is any question about it, of denying or filing some sort of answer to the petition to have that in the record. As far as the verification of the petition is concerned, that is off because it was apparently a petition filed to get an order to show cause.

The COURT. Suppose I should say we adjourn this admiralty proceeding now, Mr. Weinberger, et al., and proceed to permit you to file a petition to suppress the evidence upon the part of Rizzo. You have already said you would make the same defenses to that.

Mr. BESSON. Yes.

The COURT. Why shouldn't we proceed then to take this testimony as if the petition to suppress were also on file because I would be obliged in view of my strenuous direction to them to proceed in this manner to permit them to proceed by petition to suppress the evidence. I don't see we are going to accomplish anything either way.

Mr. BESSON. We think also that an answer would appear on file.

The COURT. Yes.

Mr. BESSON. With affidavits.

The COURT. And then an answer covering the statements made here would have been filed to such a petition to suppress so that we will have both proceedings concerned here.

189 Mr. WEINBERGER. That is the reason I suggested that.

The COURT. All right.

(A short recess was here taken, and Mr. Besson furnished counsel with a list of names.)

The COURT. You got the list of witnesses?

Mr. WEINBERGER. Yes.

Mr. BESSON. I would like to ask another question. This goes to the question of the claimant; whether any stipulation for costs was filed.

The COURT. Yes; they presented a lot of stipulations for costs, which were handed to Mr. Worth.

Mr. KESSLER. They are on the clerk's desk now.

The COURT. $250 apiece.

Mr. BESSON. At this time, if the Court please, I do not know whether that will be sufficient to pay for the storage of these vessels or this cargo for any considerable length of time. I mean the rule placed a minimum of $250 as the stipulation that may be filed. I want to reserve the right to ask for a greater security in the matter. I mean it may be necessary to protect the rights of the Government that there be a greater amount of security for costs put up by the claimant. I mean—your Honor has in mind perhaps four or five cases in which libels were filed involving seizure of property and very considerable sums have been advanced by the Government, and I think at the same time no provision has been made by the claimants in those cases; certainly at the outset they ought to provide adequately.

The COURT. Shall we let those go on file?

Mr. BESSON. Yes; they may go on file now, but——

190 The COURT. I think as far as I am concerned the matter will have pretty prompt despatch.

Mr. BESSON. Yes, sir.

The COURT. You may reserve a right to come and ask for some more costs.

Mr. BESSON. I would like to find out from the marshal what the probable cost to the Government would be, because I have no basis now upon which to submit any application to the Court.

The COURT. All right.

Mr. WEINBERGER. I will call Mr. Pernisco.

The COURT. I take it we are proceeding in the libel against 146,157 gallons of alcohol.

Mr. WEINBERGER. Correct.

The COURT. All right.

GEORGE PERNISCO, called on behalf of the claimant, being duly sworn, testified as follows:

Direct examination by Mr. WEINBERGER:

Q. Mr. Pernisco, you made a complaint, did you not, against Frank Rizzo, of 243 Avenue A, Bayonne, New Jersey?

Mr. BESSON. Objected to.

The COURT. What is the objection, Mr. Besson?

Mr. BESSON. I think that has no pertinency to the validity of this search and seizure, nor is it a proper method of proving a complaint. It is merely a conclusion as to the character of a document

191 which was signed by this man, who may not be in a position to properly characterize such a paper.

The COURT. What difference would it make?

Mr. BESSON. We are simply going afield.

Mr. WEINBERGER. It is to show there was a justification at that time existing for the intervention of the court's aid to suppress the evidence. I have got to show now that this man was a complainant who made the complaint.

Mr. BESSON. If the Court please, I ask that the inquiry be confined to the seizure of the vessels and the facts leading up to the seizure.

Mr. WEINBERGER. That is all I am going to do.

Mr. BESSON. That is something that occurred subsequent to the seizure, the complaint.

The COURT. Well——

Mr. BESSON. It has no relation whatever.

The COURT. I will admit it, Mr. Weinberger. I don't think it is particularly material.

Q. You did make the complaint, did you?

A. I did.

Q. Now, was it before or after you took possession of the cargo?

A. It was after.

Q. When did you come on board the "Doris", the "Evelyn", or the "Helen" for the first time?

A. On December 12, about 5 P. M.

Mr. BESSON. Of what year?

The WITNESS. Of 1932.

Q. At that time did you have a search warrant?

A. Well, I have a warrant——

Q. Yes or no, a search warrant?

192 A. I have a warrant issued by the Collector of Customs.

Q. A search warrant?

A. To search and seizure—to search and seize.

Q. You had a search warrant?

Mr. BESSON. You mean your Commissioner's warrant?

The WITNESS. Commissioner's warrant.

Mr. WEINBERGER. You may know what he means, but I don't.

The COURT. He is just helping you, Mr. Weinberger.

Mr. WEINBERGER. I have no objection. It will be stricken out. It was not a search warrant; it was what they call a Commissioner's authority, whatever that may mean, I don't know.

The COURT. I suppose he means he had one of those little books with his picture in it.

Mr. WEINBERGER. Oh, you had a picture book? I am not interested in that.

The COURT (to the witness). He means did you have a search warrant. You didn't have a search warrant?

The WITNESS. No.

Q. You had no search warrant?

A. No.

Q. You went on board this vessel, the "Dorris", at what point?

A. What do you mean, what point?

Q. Where was the vessel?

A. Port Johnson.

Q. Who went on with you?

A. My crew.

193 Q. How many men were on the crew?

A. Four besides myself.

Q. Who were they?

A. Schnack, Gotchnak, and McCarthy, McDermott, and Dwyer.

Q. None of you men had a search warrant to board the vessel "Doris", did you?

A. No.

The COURT. Suppose we get his official capacity.

Q. What is your status?

A. I am a Customs Guard in charge of a patrol boat, Customs patrol boat.

Q. The name and number of that boat was what?

A. 546.

Q. It patrolled where?

A. During that night I had the district of anchorages as far as Port Newark.

Q. How long had the "Doris" been lying there to your knowledge at this Port Johnson?

A. That I couldn't say.

Q. Don't you know it was there approximately two weeks?

A. Well, I couldn't say that.

Q. When had you first seen it?

A. When I first seen it was about five o'clock.

Q. That is the first time you ever saw the vessel?

A. Yes.

Q. When was the first time you ever saw the "Evelyn" or the "Helen"?

A. At the same time, the three of them together.

Q. As a matter of fact, you don't know when it was tied to the wharf for the first time, do you?

A. No, sir.

Q. You don't know how long it had been at the wharf before you went on board?

194 A. No, sir.

Q. When you came there was it dark or light?

A. Light.

Q. It was December the 12th, 1932, at about 5 P. M., you say?

A. Yes, sir.

Q. Who was the first man—by the way, when you approached the "Doris"—what vessel did you first go on?

A. "Doris."

Q. Didn't you go on the "Evelyn" first?

A. "Doris."

Q. Did you speak to anyone before you went on the "Doris"?

A. Why, there was nobody aboard the "Doris."

Q. Did you speak to anyone anywhere on any of the vessels there before you went on the "Doris"?

A. I did not.

Mr. WEINBERGER. Mr. Nason.

(A man arose.)

Q. See that young man there?

A. After I made the seizure.

Q. Did you see him there, I am not asking you when?

A. No.

Q. You never saw him there?

A. Not until the seizure was made.

Q. Where was he before you seized?

A. I don't know where he was.

Q. How many vessels were there, will you just tell the Court, at that wharf?

A. At that wharf there just was the "Doris" and the "Evelyn."

Q. Wasn't there the "Helen"?

A. The "Doris" and the "Evelyn", in back of the "Doris" was the "Helen."

195 Q. Wasn't there any other boat there?

A. Not on that wharf.

Q. Along that wharf?

A. Along that wharf there was no other vessel.

Q. That was the Central Railroad wharf, was it not?

A. Suppose to.

Q. Do you know?

A. Suppose to.

Q. What do you mean "suppose to"?

A. I don't know who it belongs to.

Q. Did you inquire from anybody on the wharf, or did you get right off your boat and go on the "Doris"?

A. Got off of my boat and went on to the "Doris", meanwhile——

Q. Never mind meanwhile. You went right off your boat?

A. On to the "Doris."

Q. Who went with you, if anybody?

A. My crew.

Q. You went there because somebody had told you to board that boat, did you?

A. Had information.

Q. Then you did it because someone told you to go on board the boat?

A. Had information.

Q. What do you mean by information?

A. Had information.

Q. What do you mean by information?

A. Well, I received information from my head of my department.

Q. Then they told you to go on, didn't they?

A. (No response.)

Q. Who was the head of your department that told you to go on board the "Doris"?

196 A. Nobody told me to go board; I went there on information by the head of my department.

Q. Who is the head of your department?

A. Station Inspector Pollock.

Q. Is he here?

A. Yes, sir.

Q. You personally, then, knew nothing about that boat, did you, when you went on it, except from the information you got from a superior?

A. That is right.

Q. Did you see the boat "Paola" there?

A. "Paola"; no.

Q. There was not a boat there, "Paola"?

A. I didn't pay any attention to what boats were there.

Q. What is that?

A. I didn't pay any attention to what boats. I was interested in them three barges.

Q. Were there any other barges there, one of which was the "Paola"?

A. I wasn't paying any attention to any barges that were there beside the one I was interested in.

Q. Did you go on any of the other boats to find out who was in charge of the "Doris"?

A. I went aboard the "Evelyn."

Q. Did you—you did go aboard the "Evelyn"?

A. Yes.

Q. Before you went on the "Doris"?

A. The "Doris" first.

Q. Is that right?

A. I went aboard the "Doris" first.

Q. You just said a minute ago——

Mr. BESSON. I object to that. Counsel is simply confusing the witness. The witness said a number of times he went on the "Doris" first.

Mr. WEINBERGER. Then he changed it now.

197 The COURT. Just a minute. He said he went aboard the "Evelyn." He said he went aboard the "Doris" first.

Q. What is correct?

Mr. BESSON. I object to that.

The COURT. No; just tell us how you explain that, what you said, that you went aboard the "Doris" first, now you say you went aboard the "Evelyn", and went aboard the "Doris" first.

The WITNESS. I went aboard the "Doris" first.

The COURT. Yes.

The WITNESS. Afterwards I went aboard the "Evelyn."

The COURT. Yes.

The WITNESS. And was met by Frank Rizzo. He says, "What are you doing here?" I says, "We are custom officers."

The COURT. Where was this, aboard the "Evelyn" or "Doris"?

The WITNESS. Aboard the "Evelyn" after we had looked over the "Doris."

Mr. WEINBERGER. Just a minute.

Q. Were you the one who got the direction from your superior officer in the presence of the other men who went with you?

Mr. BESSON. I object to that.

Mr. WEINBERGER. Withdraw that.

The COURT. All right.

Q. When you got your orders from your superior officer who was present?

198 A. Well, I was the only one in the booth, telephone booth.

Q. In the booth?

A. Yes.

Q. In other words, it was a telephone call from your superior officer to a booth which you answered?

A. I called my superior from Ellis Island and he give me the orders, information.

Q. Were you in charge of this boat that went over?

A. Yes, sir.

Q. Those men were all under you?

A. Yes, sir.

Q. You were in charge of the boat so that it was you who got the orders from the superior to go on board the "Doris"?

A. Yes.

Q. Is that right now?

A. That is right.

Q. What time did you get the order?

A. Got the order about 4 P. M.

Q. Did you see Captain Walsh there?

A. Not until after the seizure was made.

Q. Was there a "Walter" scow there, another barge?

A. Not at that particular dock.

Q. Where was the barge "Willie" and the "Walter" scow?

Mr. BESSON. I object to that. It is containing an unwafranted assumption of fact.

Mr. WEINBERGER. I will withdraw it.

Q. Where did you meet Mr. Ryan?

A. I don't know who is Mr. Ryan.

Q. I beg your pardon. Mr. Walsh.

(A man arose in the court room.)

Q. Do you know Mr. Walsh?

199 A. Yes.

Q. I called him Mr. Ryan by mistake. I want to thank you.

A. Yes.

Q. Where was he?

A. After the seizure was made Captain Walsh come down there and asked me if I want any assistant.

Q. Did he ask you if you had a search warrant?

A. Didn't.

Q. Did he ask you what your authority was to go on board this boat?

A. No.

Q. Didn't ask you that?

A. Didn't ask me at all, just asked me if I want any assistant. I told him no, I could take care of him myself.

Q. Let's see——

The COURT. Now, Mr. Weinberger, I am going to give you a reasonable latitude with this witness but after all he is your witness, you know. I will give you a reasonable latitude but don't consider it entirely cross-examination.

Mr. WEINBERGER. If your Honor please, may I say to your Honor because of the legal aspect involved in this case I, with deference to

your Honor's viewpoint on the subject, feel the Government should really have taken the direct and we the cross, but I have taken your Honor's suggestion.

The COURT. All right.

Mr. WEINBERGER. If the law is as we say it is, your Honor ought to treat this as cross-examination of their witness.

The COURT. All right. Go ahead.

Q. Where was the "Doris" tied?

200 A. The "Doris" was tied alongside of the wharf there, one of the wharves.

Q. How was it tied?

A. With lines.

Q. How long were the lines?

A. I didn't stop to measure the lines.

Q. About how long?

A. I don't know.

Q. Was it attached to any other barge?

A. No; it was attached to the dock.

Q. Just to the dock. Alongside of it was the "Evelyn"?

A. Right.

Q. And what else?

A. Behind it was the "Helen."

Q. Were they fastened to one another?

A. The "Doris" and the "Evelyn" was together; the "Helen" in back of the "Evelyn."

Q. Were they fastened together by anything?

A. The "Doris" and the "Evelyn" was fast together.

Q. And the other boat was not?

A. Was in back and was not fastened to the other.

Q. How were the two of them fastened?

A. By a line.

Q. A line. How long was it, about, you mean a rope?

A. A rope.

Q. How long?

A. Well, I didn't measure the rope.

Q. Who is the first man to leave your boat?

A. I was.

Q. Describe that barge to the Court, will you?

The COURT. Which one?

Q. The "Doris", the one you go on to?

A. She is about forty feet long, about twenty-five feet wide.

201 Q. Open or closed body?

A. Well, it is a tank barge.

Q. What is that?

A. Tank barge.

Q. Open or closed?

A. Well, it is a tank barge.

Mr. BESSON. Is that material? Counsel claims the boats; they must know the dimensions of them, and they have the ship's document.

Mr. WEINBERGER. It is important.

The COURT. He wants to show——

Mr. BESSON. That he didn't search the "Doris"?

The COURT. The legality of the seizure, I suppose.

Mr. WEINBERGER. I want to show no justification for going on board the boat.

The COURT. All right.

Mr. WEINBERGER. Counsel knows what I mean.

Q. Was it open or closed?

A. It was a tank barge.

Q. I know that, but there are tankers that are open with the tank exposed, and tankers that are closed with the tank not exposed.

A. Well, it was closed.

Q. Why don't you say so? Tell us what you did in order to get down to the place where the tank was?

A. Well, I didn't have to get down to the tank, but I just opened one of them and I got the odor of alcohol.

Q. Opened one of what?

A. The manhole plates, and I put my flashlight down there and I seen a quantity of alcohol.

202 Q. Who gave you authority to open a manhole?

Mr. BESSON. Objected to.

The COURT. Yes.

Mr. WEINBERGER. I press it for one reason; I submit up to the time he opened it he had no right to, as a matter of law.

The COURT. Well——

Mr. BESSON. I think the question can be pressed in another way. I object to the form of it.

Mr. WEINBERGER. Thank you for your suggestion.

Q. Did anyone give you permission to open the manhole?

A. At that time——

Q. Yes or no.

A. There was no one there to give me permission.

Q. Then you didn't get permission from anyone, did you, did you?

A. (No response.)

Q. Did you?

Mr. BESSON. I object to that as a foolish and senseless question.

The COURT. No.

Mr. BESSON. No one was there, and the man opened the manhole.

Mr. WEINBERGER. And it is a foolish, senseless evasion.

The COURT. Gentlemen, gentlemen, gentlemen.

Mr. WEINBERGER. Yes.

The COURT (to the witness). You didn't get any permission to open the manhole?

203 The WITNESS. There was no one there.
The COURT. You can say no if you didn't.
Mr. WEINBERGER. He doesn't like the word no; he didn't like it.
The COURT. Mr. Weinberger, let me handle the witness.
You didn't get permission?
The WITNESS. No, sir.
Mr. WEINBERGER. That is all.

Cross-examination by Mr. BESSON:

Q. Now, will you state again what your official position is in the coast guard?
A. I am in the customs service as a customs guard in charge of patrol boat "546."
Q. And what are your duties?
A. To search vessels, look for contraband.
Mr. WEINBERGER. I object to the question as to what his duties are.
Q. You have authority, have you not, under the Department of Commerce?
A. And check up on identification.
Mr. WEINBERGER. One minute.
The COURT. Don't answer the question.
Mr. WEINBERGER. That is a question of law for the Court.
Mr. BESSON. I can offer the regulations.
The COURT. Yes; you can offer the regulations.
Mr. WEINBERGER. On their part of the case.
The COURT. Yes. He is a customs guard, as I understood.
204 Mr. BESSON. Yes, sir.
Q. Now, you had, for the purpose of performing you duties the boat, did you not?
A. Yes, sir.
Q. What was the name or identification of that boat?
A. It was "546."
Q. Coast guard "546."
A. Custom patrol boat "546."
Q. Where were you when you got the information which led to your going to Port Johnson?
A. I was at Ellis Island.
Q. Where is Port Johnson?
A. Port Johnson is in Bayonne.
Q. Bayonne in what State?
A. Jersey.
Q. New Jersey?
A. New Jersey.
Q. And that is in the Federal District of New Jersey, isn't it?
A. Yes, sir.

Q. Now, what was the name and title, full name and title of the man who called you and gave you this information?

A. His name was that gave me as Frank Rizzo.

Q. No; I mean the man who called you up and told you to go to these barges and the boat?

A. Station Inspector Pollock.

Q. Is that his title, Station Inspector Pollock?

A. Station Inspector Pollock, Assistant Chief of the Enforcement Division.

Q. He is also in the customs service of the United States?

A. Yes, sir; yes, sir.

Q. Just what information did Pollock give you?

Mr. WEINBERGER. That is objected to on the ground it is hearsay.

205 Mr. BESSON. If the Court please, I think it is proper for him to tell what it is because there are searches that are reasonable and unreasonable. Of course, we are going to claim that this man had a right to search under Section 581, that he had a right to search for violation of the navigation laws, and that these were licensed vessels, but in addition to that, I think the Court has a right to go into the background and find out what it was that led up to the making of the search, what it was upon which this probable cause could be found.

The COURT. I think I will let him answer it.

Mr. WEINBERGER. May I——

The COURT. You may have an exception.

Mr. BESSON. There is no jury here.

The COURT. That is the reason——

Mr. BESSON. And the Court can hear the testimony.

Mr. WEINBERGER. I agree with your Honor on the fact there is no jury here. The reason I make the objection is one that looks to me like one Mr. Besson cannot answer, hearsay.

The COURT. Absolutely hearsay.

Mr. WEINBERGER. And he may bring the man who gave him the information.

The COURT. That is right.

Mr. WEINBERGER. But he can't ask this man to tell what some one else told him because that clearly on any theory could not be evidential.

Mr. BESSON. I think it is evidential in this kind of a case, and I will, of course, produce the man at any rate and corroborate

206 the fact that he received the information, but this goes to a question of probable cause.

The COURT. Yes; it is true. He actually made the seizure and it is a question of whether the search is reasonable. I will allow it. You may have an exception, Mr. Weinberger.

Mr. WEINBERGER. Thank you.

(Claimant's counsel prays an exception, which ~~is hereby allowed~~ and sealed accordingly.) (Sealed.)

Q. Will you answer that question? (Question read.)

A. He informed me "to go to" told me that he had information on three tanks, two supposed to be at Port Johnson, one was not there, it was at Port Johnson, it was supposed to come in there.

Q. Did he give you the names or numbers?

A. He give me the names as the "Helen", the "Evelyn", and the "Doris."

Mr. WEINBERGER. Our exception goes to all this line of examination?

The COURT. Yes.

Mr. WEINBERGER. Thank you, sir.

A. The "Doris" and the "Evelyn", the "Doris" and the "Helen" was supposed to be down there and the "Evelyn" was to come in, so I proceeded to Port——

Q. Did he give you any document numbers or license numbers of these vessels?

A. Just give me the names, just the names.

Q. Just the names, did he describe them?

A. Yes; he described that they are two tank barges and one tank barge with a Diesel engine.

207. Q. Did he identify the different classification of vessels by name?

A. The "Evelyn" he says was propelled.

Q. That is, that was the one with the Diesel engine?

A. Diesel engine.

Q. And the other two——

A. Were just floats.

Mr. WEINBERGER. I object to that. He says he never got——

Mr. BESSON. He said it was propelled. He changed the word, that is all. I was just trying to save time.

Mr. WEINBERGER. I beg your pardon. Put it right in, Mr. Besson.

Q. And the other two were the barges?

A. Were the barges.

Q. Now, how long after you got on the boats, on the "Doris" did you encounter any one?

A. Oh, about between three to five minutes.

Q. And whom did you see?

A. Frank Rizzo.

Mr. BESSON. Rizzo, will you stand up.

(A man arose in the court room.)

Q. Is that the man that you saw?

A. Yes, sir.

Q. Now, what, if anything, did Rizzo say to you?

Mr. WEINBERGER. If your Honor please, may we formally object to that. On the direct your Honor asked the question which might have involved a conversation. I didn't go into that feature of it, and it is not cross-examination.

Mr. BESSON. I think that is absolutely proper cross-examination, what took place there, what were the circumstances, and this is the claimant.

208 Mr. WEINBERGER. He said he met him after he went on the boat. Any conversation thereafter would not be any justification at this juncture for seizing that vessel.

Mr. BESSON. I object to that. I think those conversations are important.

Mr. WEINBERGER. I am making formal objection for two reasons.

Mr. BESSON. Your Honor may hear them and if necessary reserve them.

The COURT. Yes.

Mr. WEINBERGER. Your Honor asked the question on direct, if your Honor will see the testimony written you will find you asked the question what conversation he had with Rizzo possibly, but nowhere in my direct did I talk about any conversation.

The COURT. I don't think I asked the question. I think he volunteered the information in answer to a question I asked.

Mr. WEINBERGER. That may be it.

The COURT. I didn't ask him what conversation he had.

Mr. WEINBERGER. He gave the conversation.

The COURT. He started to.

Mr. WEINBERGER. We object to it on the ground this is after the seizure and has no materiality to the subject matter.

The COURT. All right. You may have an exception.

Mr. WEINBERGER. There cannot be any evidence to substantiate the seizure.

209 (Claimant's counsel prays an exception which is hereby allowed and sealed accordingly.) (Sealed.)

Q. What was the conversation?

A. Well, Rizzo come out of an aft cab, he says, "What do youse want aboard." I told him we are custom officers.

The COURT. Talk a little louder.

A. I told him we were customs officers and we were going to look him over for contraband and false tanks. So he says, "All right." I says, "Who are you?" He says, "I am a watchman." I says, "Is the captain aboard?" He says, "No." I says, "How about the ship's papers, have you got them?" He says, "No", he says, "I am just a watchman hired this afternoon by a man named Rogers." "Well", I says, "We are customs officers and we are going to look you over." So we went up forard of the "Evelyn" and were about to lift the manhole plates up. He says, "Don't open that", he says, "There is inflammable gasoline", he says. "Explosion." So I opened it and I got the odor of alcohol. So I immediately placed him under arrest. I says, "Who is the owner." He says, "I don't know."

Mr. WEINBERGER. This is all subject to my objection.

The COURT. Yes.

Q. Did he at any time admit ownership of the alcohol?

Mr. WEINBERGER. Object to that.

A. No, sir.

Mr. WEINBERGER. On the ground it is immaterial.

210 The COURT. Let him make him his witness for that.

Mr. WEINBERGER. I don't want to be bound by it.

The COURT. Yes; because you have a claim in here by Mr. Rizzo as the owner, he swears he is the bona fide owner.

Q. Now, were there any other persons there at the time you were holding this conversation with Rizzo?

A. Yes, sir; there was the coast guard boat there at that time with its crew and my crew.

Q. How far were they standing from you and Rizzo?

A. We were all together there in a group.

Q. Will you name again the persons who composed that group?

A. Well, I will name my crew but I don't know any of the coast guard.

Q. You don't know their names?

A. Outside of the man in charge.

Q. Had a man named Carlsson, an officer named Carlsson arrived there?

A. Yes, sir.

Q. Was he present at that time?

A. Yes, sir.

Q. Were any other persons that you knew personally there with you?

A. Outside of my crew and——

Q. Who was in your crew there?

A. That was Schnack, McCarthy, McDermott, and Dwyer.

Q. Schnack, McCarthy, McDermott, and Dwyer?

A. And Carlsson and his crew.

Q. Did any other persons come aboard who were not Government officials at the time?

211 A. No, sir.

Q. You have pointed out a man by the name of Walsh; Captain Walsh has been pointed out to you in the court room, a man whose name is said to be Captain Walsh; did you see him there?

A. That was after the arrest.

Q. Well, now, where was he?

A. He come aboard the "Doris."

Q. Where did he come from?

A. Well, from up the docks there somewheres.

Q. What did he say?

A. He says, "Do you want an assistant?" I said, "No; I can take care of it myself."

Q. Did you see any other alcohol on the piers or dock nearby?

A. No; outside of the "Doris" and the "Evelyn", I didn't.

Q. Did you look around?

A. Well the coast guard at that time had the "Helen."

Q. Yes; I know; but did you go over on the dock or look around there at all for alcohol; yes or no?

A. Yes.

Q. What did you find, if anything?

A. There was none on the dock.

Q. Was there any any place beyond the dock?

A. No, sir.

Q. Was anybody with Captain Walsh?

A. No, sir.

Q. Just tell us what Captain Walsh said.

A. He says, "If you want any assistant or need help or anything around here", he says, "let me know", and he was anxious to know when we were going to pull them barges out.

The COURT. Don't tell us what he was anxious to know. We can't very well get that in.

212 Mr. BESSON. No.

Q. Just tell us what he said; not your opinion of what he said, but what he said. What did he say?

A. He asked me if I needed any help there.

Q. And that is all?

A. That is all.

Q. He didn't ask you when you were going to get the barges out?

A. "And when are you going to get the barges out?"

The COURT. Do you know Captain Walsh?

The WITNESS. Yes, sir.

The COURT. Did you know him from before?

The WITNESS. No, sir.

The COURT. Who is he?

The WITNESS. I don't know him from before outside of that night.

The COURT. Has he any official connection with the dock that you know of?

The WITNESS. He told me he was in charge of them boats there.

The COURT. He asked you all the conversation between Walsh and you.

The WITNESS. I don't know what his official capacity is.

Q. What did he say; what language did he use when he said he was in charge of "them" boats?

Mr. WEINBERGER. Your Honor has given me an exception to this whole line of examination?

The COURT. Yes.

A. Well, he says, "I am in charge of these boats here."

213 Q. What boats?

A. The yard.

Q. The whole yard?

A. That is the boats that were tied up.

Q. That is the "Doris", the "Evelyn"?

A. No; not the "Doris" but the others.

Mr. WEINBERGER. I submit he to be permitted to say what he said and not have counsel lead him.

Mr. BESSON. This is cross-examination.

Mr. WEINBERGER. Oh, it is mighty cross. I beg your pardon.

The COURT. All right.

Tell us, Mr. Witness, everything that you said to Captain Walsh and all that Captain Walsh said to you, will you, as far as you can recollect it now?

The WITNESS. Well, he says he was in charge of the yard.

The COURT. In charge of the yard.

A. The yard there and the boats that were tied up, so I asked him if he was interested in these three boats. He said, "No", he says, and he says, "If you want any assistant or anything like that", he says, "let me know."

Q. Did you make any search of the boats for the ship's papers?

A. I did.

Mr. WEINBERGER. May I have——

Q. What search did you make?

The COURT. Just a minute.

Mr. WEINBERGER. May I formally, while you consider the evidence, move to strike out all of the evidence which this witness
214 gave with regard to the subject matter which obviously has no bearing on the case and which does not relate to what he just gave as his complete answer in response to the question suggested by the Court and made by Mr. Besson.

The COURT. I don't see how the conversation with Captain Walsh has anything to do with it.

Mr. BESSON. This other man, apparently, according to his statement, was merely a watchman.

The COURT. He says Captain——

Mr. BESSON. Captain Walsh had some proprietary interest in the yard or place there and apparently some control over vessels generally in the place though not the owner of these vessels, according to his statement.

The COURT. He said he had no interest whatsoever.

Mr. Besson. In the vessels.

The COURT. I don't see how it is material, even if Captain Walsh was in control of the yard.

Mr. BESSON. I don't think we are precluded by what Captain Walsh said there except that a man came before these vessels and manifested an interest in what was taking place there. I think we ought to have that on the record. Who this man was, what his interest was is not as far as the Government is concerned to be concluded by his own statement. It may be he did have an interest.

The COURT. Well——

Mr. WEINBERGER. He says, as Your Honor suggested, he had nothing to do with the three boats in question, affirmatively.

215 The COURT. I will strike that, for the present, Mr. Besson.

Mr. BESSON. Of course they brought in this question about Captain Walsh, they have him sitting here, they pointed him out; I don't know who Captain Walsh is.

The COURT. You have your man, you can make him sit here and if they produce Captain Walsh to say anything you have him to reiterate what he said now, but at the present time I don't see why I should go into that.

Mr. BESSON. It seems to me important because apparently the man was in charge of the yard. I don't want to trespass on your Honor's good nature.

The COURT. It is all right.

Mr. BESSON. But here was a fellow supposedly in charge of these boats.

The COURT. According to the testimony, given its worst inferences, he came up and said, "Can I help you, can I do something for you? I have no interest in these boats but I would like to do something for you."

Mr. BESSON. Well, I will get back to the search for the ship's papers.

Q. Did you make any search for the ship's papers?

A. Well, after I asked Frank Rizzo if he knew where the ship's papers were he told me he didn't know where they lay, so I finally found them in the—aboard the "Evelyn" in the pilot house.

Q. Did you find the papers for all three vessels?

A. Yes, sir; in the pilot house of the "Evelyn."

Q. What papers did you find?

A. Ship's papers of the "Doris" and the "Helen" and the "Evelyn."

216 Q. What were those ship's papers?

A. The ship's——

Q. Was there a log, did the ship have a log, did you find a log there?

A. No; there was no log outside of the papers.

Q. You mean by that the documents?

A. The documents.

Q. The enrollment and the license?

A. Yes.

Q. What did you do with them?

A. I took them along with me.

Q. Where are they now as far as you know?

A. Mr. O'Keefe has them over there.

Q. And these are the papers which you found there [indicating]?

A. Yes, sir.

Mr. WEINBERGER. Found and took.

Mr. BESSON. I ask they be marked for identification.

The COURT. Yes.

(Papers marked "G-1, 2, and 3" for identification.)

Q. You say those were found on the "Evelyn"?

A. In the pilot house.

Q. Yes. Were there any other papers there?
A. No; there were not any other papers there.
Q. Now, did you know of anything else or any other conversations that were held with Rizzo on the boat before you left or on any boats?
Mr. WEINBERGER. That is objected to on the ground it is immaterial, sir, improper.
Q. Yes or no?
Mr. WEINBERGER. Just read the question.
The COURT. I will let him answer yes or no.
217 A. I didn't get that.
(Question read.)
A. No; that was all.
Mr. WEINBERGER. May be a Coney Island excursion boat.
Q. Or any of the three boats?
The COURT. All right.
A. That was all the conversation we had.
Q. I see. What vessel did you seize?
A. The "Evelyn."
Q. Who seized the other vessels, if you know?
Mr. WEINBERGER. I object to that on the ground——
A. Carlsson.
Q. If you know?
A. Carlsson.
Q. Do you know or don't you?
Mr. WEINBERGER. That is objected to on the ground it is a conclusion.
A. Yes.
Q. You do know?
The COURT. Just a moment. He is objecting to it, and I will overrule the objection. You may have an exception.
Mr. WEINBERGER. Thank you, sir.
(Claimant's counsel prays an exception, which is hereby allowed and sealed accordingly.) (Sealed.)
(Question and answer read.)
Q. Now, tell us who it was that seized the other vessel?
A. Boatswain Carlsson.
218 Q. He seized both of them?
A. The "Doris" and the "Helen."

Redirect examination by Mr. WEINBERGER:
Q. You went on the "Doris" first, didn't you?
A. Yes, sir.
Q. You didn't seize the "Doris"?
A. No; I didn't.
Q. You opened the manhole on the "Doris", didn't you?
A. Yes.
Q. When you opened that manhole you were there alone?

A. I was there with my crew.

Q. Were they at the time you opened the manhole standing there when you opened it?

A. McDermott, Schnack, and McCarthy and Dwyer.

Q. And you took your lamp out—your searchlight?

A. I did.

Q. And did what with it?

A. Put it down the manhole to see what was in it.

Q. What?

A. To see what was in it.

Q. To see what was in it. Where were your men at the time?

A. Right there.

Q. Standing watching you do it?

A. Yes, sir.

Q. Is that right?

A. Right.

Q. Who do you say seized the "Doris"?

A. Boatswain Carlsson.

Q. When did he seize it—right at that minute or an hour after—a half hour later, or when?

219 A. He seized it, why, a few minutes after I left to go over on the "Evelyn" to see what was on the "Evelyn." He had seized the other one.

Q. When you went to this manhole and put your searchlight out to see what was there, cast it about, Carlsson was under your supervision at that time, was he?

A. He was not.

Q. He was with you in that crew?

A. No, sir.

Q. Was he on the boat at that time?

A. Afterwards.

Q. Then he was not on the boat at the time that you took your lamp out to see what was there, was he?

A. Yes, sir; no, sir; he was not.

Q. He was not there?

A. He was not.

The COURT. How many witnesses are there going to be?

Mr. WEINBERGER. We will rest now. We want to make it as short as we can. We would like to hear the Government now.

Mr. BESSON. I have several I would like to call.

The COURT. All right.

BENJAMIN M. CHISWELL, called on behalf of the Government, being duly sworn, testified as follows:

Direct examination by Mr. BESSON:

Q. Captain Chiswell, will you state your official position as it was on December 12, 1932?

A. Commander of the Coast Guard Division of New York.

220 Q. Was this witness who was just on the stand who gave his name as Pernisco under your command?

A. No, sir.

Q. I direct your attention here to an envelope and a letter in it in typing and ask you——

Mr. BESSON. First I will have it marked for identification.

(Letter and envelope marked "G–4" for identification.)

Mr. BESSON. Both to be marked, the envelope and the enclosure.

Q. Directing your attention to that G–4 for identification, tell us what you know about that? [Handing paper to witness.]

A. This was delivered about mid-afternoon of [redacted]

Q. To you?

A. To me, yes; and there was a visitor in my office at the time, but as soon as he left I called Mr. O'Keefe's office and Inspector Lynch answered the phone and I read this to him. I then called Captain Gabbett, in charge of our section base at Stapleton, and read this to him.

Mr. BESSON. Now, I desire to offer that letter and the enclosure, that is the envelope and the enclosure in evidence.

Mr. WEINBERGER. May we see it, Mr. Besson, and examine it as to its contents?

(Papers handed to counsel.)

Mr. WEINBERGER. Thank you, sir. For the purpose of the record may I show the thing before I make my formal objection, if the Court please?

The COURT. Yes.

221 Cross-examination by Mr. WEINBERGER:

Q. I call your attention to the fact that this Exhibit G–4 for identification is in typewriting; is that right, sir?

A. That is right.

Q. And bears no name?

A. That is right.

Q. Bears no address?

A. That is right.

Q. Bears no sign of identification of any kind or character?

A. That is right.

Q. It doesn't identify any human being as the sender of it, does it?

A. It does not.

Q. Nor do you know who the sender was?

A. I do not.

Q. I direct your attention specifically to the envelope in which the letter, the so-called typewritten sheet, is contained and ask you whether it shows the sender's name or whether it was sent by any human being?

Mr. BESSON. Objected to. The envelope speaks for itself.

Mr. WEINBERGER. I am talking for the record so I can make my formal objection.

The COURT. Yes; that is right. You may answer it.

A. It does not.

Q. Nor do you know who sent it?

A. I do not.

Q. The first knowledge that you ever had with regard to this envelope or the letter was when you received it?

222 A. When I received it.

Q. And that is the first time you knew anything about what it contained when you opened it upon receipt?

A. That is right.

Mr. WEINBERGER. Now, if the Court please, the letter is formally objected to on the ground, under the Alfred case, the defendant in a case of this character, the claimant or any person would be entitled to know the source of the information and the name of the individual for the purpose of determining whether or not there was probable cause and would have a right to examine the witness and call him for the purpose of establishing the fact and sustaining the question as to probable cause.

Mr. BESSON. May it please the Court, I think there is no merit in that contention. We are not going into a question of witnesses, we are going into a question of what a police officer or an officer charged with law enforcement must act on. An officer running down the street might encounter some one who says that a man was just killed and that he saw a man run into a house. A felony has been committed. Is he to sit down and find the name of the man and have him questioned before going in the house and catching the murderer? No.

The COURT. But I don't think I can admit the writing.

(To the witness:) As a result of an anonymous communication received you called up these various officials and told them to do what, Captain?

The WITNESS. I did not tell them to do anything. I gave them the information contained in the anonymous communication.

223 The COURT. I see. With reference to what?

The WITNESS. I simply read them the communication.

The COURT. You know what the contents of the communication were.

Mr. WEINBERGER. Now, we make the formal objection in another way.

The COURT. All right.

Mr. WEINBERGER. Your Honor, of course, I remember your Honor was United States Attorney and——

The COURT. Yes; I understand.

Mr. WEINBERGER. And you would expect me to object.

The COURT. I certainly do. I grant you an exception.

Mr. WEINBERGER. Thank you.

(Claimant's counsel prays an exception, which is hereby allowed and sealed accordingly.) (Sealed.)

Direct examination (continued) by Mr. BESSON:

Q. Do you find it necessary to read this over to refresh your recollection as to what you told them?

A. No. I didn't tell them anything; I just read them; gave them that.

Q. If you can't remember what you read to them now, do you find it necessary to refer to this in order to tell?

A. I can give you in general terms what it contains.

224 The COURT. Now, Mr. Besson, I think you had better not extend it too far. Have you got these captains here now?

Mr. BESSON. Yes.

The COURT. Going to call them?

Mr. BESSON. Yes, sir. Then we fall upon the same objection that was made before with respect to the previous witness. Counsel then objected because I ought to produce the man who told him.

The COURT. Yes; they are still objecting because you should produce the man who wrote the letter.

Mr. BESSON. Suppose your Honor allow it in at this time with the reservation of the right to strike.

The COURT. I am pretty broad on those things, but I don't think we can let the actual instrument itself go in, Mr. Besson.

Mr. BESSON. Or the language of it that he told them if he can refresh his recollection?

The COURT. You have got now that he got an anonymous communication and called certain officers. You have those officers here; there ought to be no difficulty—as a result of information I did this.

Mr. BESSON. I will call the next one.

The COURT. You are entitled also to an exception, Mr. Besson, to my ruling on my refusal to let these papers in.

Mr. BESSON. This is an admiralty proceeding, is it not?

The COURT. Yes. I think you are entitled, if I am not mis-

225 taken, to go up without any reservations or exceptions, but I will give them to you anyway.

(Government's counsel prays an exception, which is hereby allowed and sealed accordingly.) (Sealed.)

Mr. BESSON. Captain Gabbett. He will be coming in out of order, I think.

CECIL M. GABBETT, called on behalf of the Government, being duly sworn, testified as follows:

Direct examination by Mr. BESSON:

Q. Captain Gabbett, what is your rank and what was your rank on December 12, 1932?

A. Captain of the United States Coast Guard, commander of section base 2, Stapleton, New York.

Q. Do you know Captain Chiswell, the previous witness?

A. Yes, sir.

Q. Do you know the sound of his voice?

A. Yes, sir.

Q. Did you receive a communication from him on December 12, 1932?

A. Yes, sir.

Q. What was it and where did you receive it?

Mr. WEINBERGER. Objected to.

The COURT. No; I don't think he can tell that conversation, to be consistent, Mr. Besson.

Q. As a result of that communication from Captain Chiswell, what did you do?

A. I sent for Lieutenant Brooks, who is in charge of the speed boats at section base 2.

Q. Is Lieutenant Brooks in court?

226 A. He is present.

Q. All right.

A. And I directed Lieutenant Brooks to send his boats to Bayonne.

Mr. WEINBERGER. That is objected to on the ground——

Mr. BESSON. Why?

Mr. WEINBERGER. I am just objecting, that is all.

The COURT. All right, the objection is overruled. Go ahead. You may have an exception.

(Claimant's counsel prays an exception, which is hereby allowed and sealed accordingly.)

A. To a local place called Port Johnson and search three oil barges, "Evelyn", the "Doris"; and the "Helen"; one of these barges——

Mr. WEINBERGER. The conversation is objected to.

A. Was supposed to be a Diesel power barge and that vessel was supposed to be at sea.

Mr. WEINBERGER. If your Honor please, surely, sir, what the suppositive state of the boats is cannot be evidence.

The COURT. No.

Mr. WEINBERGER. I move to strike it out.

A. These barges——

Mr. WEINBERGER. One minute.

A. I felt suspicious had liquor on board, and I gave Lieutenant Brooks orders to have them searched.

Mr. WEINBERGER. May I ask that all be stricken on the ground of suspicion and suppositive state of the boats——

227 The COURT. It was information he had; as a result of information he had, he did this.

Mr. WEINBERGER. True, that is the best you can expect from him, not the frame of mind.

The COURT. I won't strike it, Mr. Weinberger. I will let it in as it is. You may have an exception.

Mr. WEINBERGER. Thank you, sir.

(Claimant's counsel prays an exception, which is hereby allowed and sealed accordingly.) (Sealed.)

A. My information was that one or more of these boats——

The COURT. As a result of this information, Captain, you despatched Lieutenant Brooks with this general information that you had received?

The WITNESS. He was in charge of the boats and I ordered him to send boats over there to make this search.

The COURT. I see.

Mr. BESSON. Any cross?

Cross-examination by Mr. WEINBERGER:

Q. You didn't tell him to get a search warrant, did you, yes or no?

A. It is not necessary to tell him.

The COURT. Just answer the question, Captain.

The WITNESS. No.

Q. Are you afraid of me?

A. No; I did not.

The COURT. All right.

228 EARLE G. BROOKS, called on behalf of the Government, being duly sworn, testified as follows:

Direct examination by Mr. BESSON:

Q. Lieutenant Brooks, what was you official position on December 12, 1932?

A. I am in charge of speedboat operations at section base 2, Stapleton, New York.

Q. Did you receive a message that day from your superior, Captain Gabbett, yes or no?

A. Yes.

Q. And as a consequence of that message what did you do?

A. I detailed Boatswain (T.) O. E. Carlsson to take charge of the coast guard picket boat "4302", take a crew of men, proceed to Port Johnson, Bayonne, New Jersey, and board two oil barges named either "Doris", "Helen", or "Evelyn." I was informed that one of the barges was out at the time and was expected in.

Q. Did you give him orders to investigate any other vessel?

A. No, sir.

Q. Well, it was two of three of those barges?

A. Two of three of those barges were in, were supposed to be in. I gave him orders to board the ones that were in and obtained the names there by process of elimination.

The COURT. Yes.

Mr. BESSON. That is all. Cross-examine.

Mr. WEINBERGER. No questions.

(No cross-examination.)

(At this point an adjournment was taken until Friday, January 6, 1933, tentatively.)

229 Friday, January 27, 1933, at Trenton, New Jersey.

Case resumed pursuant to adjournment.

Appearances as before noted.

The COURT. All right, Mr. Besson.

Mr. BESSON. May it please your Honor the Government is short one witness here, who is a man from Philadelphia, who would prove that there was no permit for the transportation of this alcohol on the boats, if that becomes necessary. I don't know how it is that the man is not here. He was among those witnesses who were notified to come back.

Mr. WEINBERGER. May we say to your Honor, for the purpose of the record, we have no objection to having it noted that were the witness here he would testify in the manner suggested by Mr. Besson and in that way eliminate any necessity for his being here.

Mr. BESSON. I am going to try to get him here at any rate.

Mr. WEINBERGER. I mean if there is any question about it.

The COURT. All right. He says that is the situation, Mr. Besson.

230 OSCAR E. CARLSEN, called on behalf of the Government, being duly sworn, testified as follows:

Direct examination by Mr. BESSON:

Q. Mr. Carlsen, what is your occupation?

A. Warrant officer, United States coast guard, boatswain T, temporary.

Q. Were you so employed on December 12, 1932?

A. I was.

Q. Did you receive any instructions that afternoon or that day from Lieutenant Brooks?

A. Yes; about 4 o'clock in the afternoon of December 12th.

Q. As a result of those instructions what did you do?

A. Well, about ten minutes after four I left in the picket boat "4302" to the destination, Port Johnson, Bayonne, carried out the orders.

Q. When you got to Port Johnson what did you do?

A. As soon as I arrived in Port Johnson I tied up alongside an oil barge, apparently oil barge "Helen", and went aboard the "Doris", and when I arrived there I seen the customs boat "546" tied up to the "Doris" and about five or six customs men about the "Doris" and the "Evelyn", so I immediately went aboard there and wanted to get in touch with the customs inspector, and I asked one of the customs men, I says——

Mr. WEINBERGER. I object to the conversation.

A. "Where is the inspector?"

The COURT. Just a moment.

Q. Was the claimant there when that happened—Rizzo; do you know Rizzo?

231 A. Yes; Frank Rizzo.

Q. Was he there?

A. Yes; he was there in the galley.
Q. It was in his presence?
A. He was in the galley of the "Evelyn" at the time.
Q. Was he at a point where he could hear your conversation?
A. Oh, yes; he was right there.
Mr. BESSON. May I renew my question then?
The COURT. All right.
Q. What did he say; what did you say to him?
A. I found that the customs inspector was Parusco, the customs inspector, so I asked him, I says, "Which one are you going through now?" the barges he was boarding at the time, he said, "I am going through the 'Evelyn.'" He had already been on the "Doris." So the customs inspector was boarding the "Evelyn" at the time I arrived. As soon as I got there, why, I started boarding, started to board, looked for somebody aboard the "Doris", didn't find anybody aboard, so I instructed my men and myself started to open the hatches on the boats; I didn't find anybody aboard the barges, and found it contained the alcohol, and simultaneously the customs inspectors discovered the alcohol on the barge "Evelyn."
Q. Did you have any part—did you have any conversation with this man Rizzo?
Mr. WEINBERGER. I move to strike what simultaneously occurred with someone else on the ground obviously——
The COURT. He said simultaneously something occurred on the "Evelyn."
Mr. WEINBERGER. I object.
232 The COURT. They found the alcohol on the "Evelyn." You don't want that in, do you, Mr. Besson?
Mr. BESSON. No; but I don't see how it is objectionable if it took place in his presence.
The COURT. He couldn't be on the "Doris" and the "Evelyn" at the same time very well.
Mr. BESSON. No; unless he saw these people doing something.
A. I was right——
Q. While you were on the——
The COURT. It will be stricken.
Mr. WEINBERGER. Thank you.
The COURT. That is, beginning with "simultaneously."
Q. While you were on the "Doris", was it?
A. While I was on the "Doris", yes, with my crew.
Q. Did you see anybody on the "Evelyn" doing anything?
A. I seen the customs inspector and his men opening the hatches, open the hatches on the "Evelyn" and——
Q. What was the name of the customs inspector you saw; do you know?
A. Pulasko, Pulasky.
The COURT. Pernisco?
The WITNESS. Pernisco; yes.

Q. Did you find anything in the hatches?

A. Yes; I opened up the forward tank on the starboard side and as soon as I opened it up, why, there was a strong odor of alcohol.

Q. Did you take any samples of it?

233 A. Took the samples of it; yes.

Q. What did you do with it?

A. Took the samples of it and had them——

Mr. WEINBERGER. Object to that, if your Honor please.

A. Sent to the chemist for analysis.

Mr. WEINBERGER. What he did after he opened the hatchway would not be evidential. The question now, as I understand it, is purely confined and limited to the question as to whether or not this was a search that was legal and a seizure that was legal. What may have transpired from the moment after this, what we regard from the testimony now as being an obviously illegal search and seizure would have no evidential value at all.

Mr. BESSON. I think that is an utterly senseless objection. In the first place, the fact that they found alcohol of potable character and of the kind that is forbidden, under the circumstances enumerated in the National Prohibition Act, is an absolutely necessary part of this case. If they searched the boat and found water on it, there would be no ground for a seizure; it is only because it was violating Section 4377 of the revised statutes which relates to the violation of its license that it becomes forfeitable—for that reason alone. The fact that it was carrying a cargo of a kind that was not within the provisions of its license brings it within that category. Unless we can show what it was carrying we would be utterly defeated.

Mr. WEINBERGER. If your Honor please, apparently despite the characterization by my friend, Mr. Besson, of it being utterly nonsensical, I could almost use the same language for the reasons he

234 urges in support of the objection he now makes or the answer that he makes. We are not interested in any question now except the one, was this or was this not a legal seizure and search. The rule of law is clearly settled that anything that may have been found cannot even be referred to as evidence because it was gotten in a manner not countenanced by law. That is the situation of the inquiry here, and the preliminary question confronting your Honor now is, was this a legal search and was this a legal seizure, and that is all we are interested in, sir; we don't care about the subject matter of his discovery later.

The COURT. Yes; that is right. Now, just a minute. We speak of Rizzo as the claimant here. Do I gather from that we are not trying this motion as to all of the other claimants as well or that they are involved in this, or just what are we doing now?

Mr. WEINBERGER. Speaking for, your Highness has got our phase of it; we appear here for Rizzo, the claimant, and I think——.

Mr. KESSLER. We appear for the boat owners, entirely disassociated from the contents of the boats, the cargo.

The COURT. It is going to be very necessary that we know just what is what here.

Mr. BESSON. I am astonished at that statement, because I didn't understand that to be what was being done at all at the last hearing.

Mr. WEINBERGER. The record clearly shows we are trying all cases together, but there is only one question involved, and the only thing involved, the only question is the question whether there
235 was a proper search and seizure in all these matters.

The COURT. Yes; that is true, but it might be a proper search and seizure to some people and it would not be to others.

Mr. BESSON. Of course, we raise the question, if your Honor please, that there was a question about the right of the claimants in the proceeding. Of course, there are two things commingled here, one is an admiralty proceeding which arises out of exceptive allegations that are filed to claims, and the other is a proceeding which by grace of your Honor is being heard, because the defendant had first come to the Court and applied by petition for an order to show cause why the evidence should not be suppressed, and as a consequence of that, your Honor instructed the petitioner in that proceeding to come again before the Court and present an application for an order to show cause why a libel of condemnation should not be filed within a time limited, and such an order was made, and pursuant to it the Government filed libels within the time limited, which was ten days. Then, after these libels had been filed claims were filed on behalf of certain parties—I think Rizzo filed a claim in one case and Mr. Kessler, acting as agent or in some capacity for the Matoil Company, filed five claims, and the Government filed its exceptive allegations, and then moved to amend the libels in part, which was granted, and it was in that state of affairs it came before the Court. All these matters were before the Court.

The COURT. The Government said something about wanting to file an answer, something in the nature of an answer so that it could deny.

236 Mr. BESSON. After we got past the exceptive allegations.

The COURT. Yes; that is right. All right.

Mr. BESSON. Of course, I claim the exceptive allegation is in the nature of a dilatory plea and should be heard first, and I might say at this time that since the last hearing the Schrieber case has been handed down, and probably your Honor has read it.

The COURT. Yes.

Mr. BESSON. Where I think that such a procedure was followed and a decree of forfeiture entered and sustained.

The COURT. All right, now, however, what we are concerned with here, Mr. Besson, is the legality of the search and seizure, and I think there is some merit to what counsel says.

Mr. BESSON. Well, I don't think that the search is aided, that is the legality of the search is aided.

The COURT. By the finding of anything?

Mr. BESSON. But at the same time the seizure is. I mean if nothing was seized that was evidential of a violation of some statute which authorized forfeiture there would be no basis for a seizure. For that reason I think I ought to be permitted to show what was seized to support not the search but the seizure.

Mr. WEINBERGER. If your Honor please, the point I make is this, and I don't think that we can be at variance on that point. Query, is or is this not an illegal search? If it is, the Court cannot be concerned now on the question of the subject matter, because that
237 is foreign to this issue entirely. We raise a question which is academic that these people in violation of law and in derogation of our legal and civil rights came into our property and illegally searched and seized. What they took, if your Honor please, makes no difference.

The COURT. I don't think it makes any difference one way or the other.

I will overrule the objection and you may have an exception if you need one. I don't know that you need one in these proceedings.

(Claimant's counsel prays an exception, which is hereby allowed and sealed accordingly.) (Sealed.)

Q. You took samples?

A. Yes, sir; I took samples.

Q. What did you do with the samples?

A. I brought them personally up to the chemist.

Q. Is the chemist in court here?

A. Yes, sir.

Mr. BESSON. Chemist, stand up.

(A man in the courtroom rose.)

Q. You delivered them to him [indicating]?

A. Yes; I delievered them to him.

Q. Indicating——

A. The chemist.

Q. You don't know his name, do you?

A. Yes, sir; Tanner.

Q. Now, after that had been done, what else happened?

A. Well, after the chemist received the samples, on the next day——

Q. Did you do anything about these boats?

A. I put guards aboard them, seized them in the name of
238 United States Government, seized them and put guards aboard them, and we reported the seizure to the commander of section base 2, New York Division.

Q. Did you have any part in the search for the ship's papers?

A. Why, the ship's papers I think one of my men found them on the barges later.

Q. Did they find them on the barge or on the tanker?

A. On the barge.

Q. Did you see them?

A. Yes, sir; I did.

Q. I show you G–1, G–2, and G–3 for identification, where were you when you saw those papers [indicating]?

A. I was aft, standing aft the deck house on the "Doria." That is the "Doris" paper [indicating].

Q. Never mind that. The Court has seen them.

A. And that is the "Evelyn", the "Helen", I didn't see the "Evelyn" at the time. That is the ship's papers.

Q. Did you make out seizure papers?

A. Yes; we made out seizure papers, violation papers at the base, the following day, which we have copies of in the file.

Q. Did you find anybody on board the vessel you seized, that was the "Doris"?

A. No; there was nobody aboard the "Doris", and the same on the "Helen", there was only one man present which was on the "Evelyn", which the customs man claimed told him he was the watchman

Mr. WEINBERGER. I ask that be stricken out.

The COURT. Just a minute.

Q. Did the man——

The COURT. Just a minute.

239 Mr. WEINBERGER. What he was told by someone.

Mr. BESSON. No; the man, if your Honor please.

The COURT. Read the answer.

(Answer read.)

Mr. WEINBERGER. I ask that be stricken. Obviously it is hearsay.

The COURT. Yes.

Mr. BESSON. Rizzo, will you stand up? Is Rizzo in court?

(A man in the courtroom rose.)

The WITNESS. That is the man.

Q. Did you see that man there?

A. Yes; I heard him say he was the watchman to the customs inspector.

Q. He was aboard what vessel when that happened?

A. That was in the galley on the "Evelyn"—the Diesel tanker.

Q. Did he say anything else at the time?

A. Well, he said he was the watchman hired by some strangers for $5 a day to take care of the three vessels there.

Q. And that is all that he said, to your knowledge?

A. That is all that he said in my presence.

Q. You didn't ask him anything about the alcohol, did you?

A. No; I didn't ask him about the alcohol on the two barges. The customs had him under surveillance.

240 Cross-examination by Mr. WEINBERGER:

Q. How long had those barges been lying there; do you know?

A. Well, there was nobody aboard the barges and it was pretty hard to find out.

Q. I didn't ask you that.

The COURT. Just answer the question.

Q. How long had they been lying there before you went on board?

The COURT. If you know.

A. Why, I can't answer that question.

Q. Can't answer it. What efforts did you make to find out who the owner was before you went on board the boat?

A. What efforts I made to find out—I asked anybody I could find around there—any strangers.

Q. Did you go up on the dock and inquire for the owner of the dock?

A. Yes; went on the next dock to find out.

Q. On that dock where they were did you go up there to find out who the owner was?

A. There was nobody on that dock.

Q. Wasn't there anybody in the world around there?

A. Nobody.

Q. Why did you go on board, then?

A. Why did I go aboard?

Q. Yes.

Mr. BESSON. I object to it as improper, going to his state of mind rather than to the facts.

Mr. WEINBERGER. If anybody should worry about that I ought to be the one who should worry.

The COURT. Let him say.

241 Q. Why did you go on board there?

A. Why did I go on board what?

Q. The barges?

A. The barges, because my orders from superiors was to go aboard there.

Q. You took orders, that is why you went on, is that it?

A. That is right.

Q. And that is the only reason why you went on?

A. Oh, I wouldn't have, wouldn't be no reason if I had been cruising around there.

Q. There is not any other reason, it is only because you got orders to do it, is that right?

A. That is right.

Q. What boat did you go on first, or what barge did you go on first?

A. On the "Doris."

Q. Who had been on that boat before you?

A. Customs Inspector Pulasko.

Q. How long had he been on, do you know, before you went on?

A. I couldn't say, about five minutes.

The COURT. How do you know how long Pulasko—Pernisco had been on the boat before you got there?

The WITNESS. Before I got there?

The COURT. Yes.

The WITNESS. Your Honor, I could tell just by the, we had a little difficulty in finding the slip where the barges were moored at the time, and I happened to go on the, go in on the east side of the dock instead of the west side which the barges were tied up on. When I went in on the west side of the slip and turned around to come
242 out again because the barges weren't there, I seen the customs boat coming down the Kills and making the round and went in on the west side, so by the time I got out again and swung around to the right I would say he had been in there a few minutes before me. That is the reason I could tell.

Q. You were both racing to get down there first, were you?

A. Not both racing; no.

Q. You were trying to outbeat the other man?

A. Oh, no; I didn't know at the time where he was bound when I saw him.

Q. I see. Well, now, did you go on board any other boats before you got on this—by the way, what boat did you go on?

A. I got on the "Doris."

Q. Had you been on any other boat before you got on the "Doris"?

A. I was on the "Helen."

Q. You were on the "Helen" first?

A. On the "Helen" first.

Q. Did you inspect the "Helen"?

A. I didn't find anybody on board.

Q. Did you inspect the "Helen"?

A. No; not at the time.

Q. Did you go through the "Helen"?

A. I did later.

Q. At that time?

A. At that time, no.

Q. So the first stop you made was from your boat on to the "Helen"?

A. That is right.

Q. How long a time did you spend on the "Helen"?

A. Well, just enough time to get on the dock.

Q. How long?

A. Well, I will say a minute.

243 Q. A minute. You got back from the "Helen", then off the "Helen" back on your own boat?

A. No; to the "Doris."

Q. To the "Doris"?

A. That is right.

Q. You stepped off from the "Helen" to the "Doris"?

A. Yes.

Q. So that the first stop you made from your boat was on the "Helen"?

A. That is right.

Q. Stayed there a minute and then went on the "Doris"?
A. That is right.
Q. You had made no other stops in the interim?
A. Oh, no.
Q. That is correct, is it?
A. That is correct.
Q. You hadn't stopped at any other boats, looked over any other boats?
A. No.
Q. Came right down to the "Helen"?
A. That is right to the "Helen." All three vessels was lying together. Two of them was together and the "Helen" was tied up astern.
Q. You got off the "Helen" and got on the "Doris"?
A. Yes.
Q. Did you examine the "Doris"?
A. First I looked up the customs inspector, asked who was in charge of the customs.
Q. I am not asking you whom you talked to, I am asking you now whether you got on the "Doris"?
A. I got on the "Doris"; yes.
Q. Did you inspect the "Doris"?
A. I inspected the "Doris" shortly after.
244 Q. You didn't get off the "Doris" after you got on, you went right out and inspected it?
A. On the "Doris"; yes.
Q. And did you go toward the hatchway?
A. First I went into the living [illegible] where we usually find the keeper or captain of the barge, whatever you call it.
Q. And not finding him you went to examine the boat?
A. Well, while we were looking for the master of the barge we could smell the, smell a strong odor of alcohol, and then afterwards, after smelling that strong odor of alcohol we proceeded to inspect the tanks which were open.
Q. Which were what?
A. Which were not locked, that is there was just put down.
Q. What did you open?
A. Open?
Q. Yes.
A. I opened the starboard tanks forward.
Q. The what?
A. The starboard tank on the right-hand side.
Q. Starboard tanks forward on the right-hand side?
A. That is right.
The COURT. That is a little nautical.
Q. When you were on the boat you say you smelled alcohol; was that in the little room you were in?
A. That was on the outside.

Q. On the boat?
A. That is right.
Q. And that was after your friend, Pisako was his name?
The COURT. No; Pernisco.
245 Q. Was already on?
A. He was on the "Evelyn" at that time; then he had already been on the "Doris."
Q. He had already been on the "Doris"?
A. That is right.
Q. Did he tell you he had already opened it and found something there like alcohol, he thought?
A. He said, I think——
Q. Did he tell you that, yes or no?
A. Yes.
Q. Then you hadn't gone out on the dock, had you, up to that time to see if you could find anybody?
A. Hadn't gone up on the dock?
Q. Yes.
A. It was night time. It was getting dark; I wasn't going to run around the dock——
Q. You didn't go out on the dock to find anybody, did you?
A. I looked on the vessel.
Q. I didn't ask you that. So you didn't, from the time you got off of your boat up to the time that you looked in the master's room, and from that that you looked into the place, you did look, you didn't go out on the dock to find anybody, did you?
A. I didn't see anybody on the dock.
Q. Yes or no?
A. No.
Q. You didn't try to find out who was the owner of the dock?
The COURT. The owner of the dock?
Mr. WEINBERGER. The wharf.
Mr. BESSON. I object. I don't see how that is relevant.
Mr. WEINBERGER. The witness says he did look around first.
246 The COURT. The owner of the dock?
Mr. WEINBERGER. The wharf.
The COURT. The owner of the wharf—that is not being libeled. What has that got to do with it?
Mr. WEINBERGER. Whether he made any effort to find the owner, the owner of the boat.
The COURT. The owner of the wharf and the owner of the dock is a different question.
Mr. BESSON. I can't see how that is relevant now.
The COURT. He said he didn't anyway.
Mr. WEINBERGER. All right.
Q. I am right, then, in saying you didn't go on the third boat to see if the owner was on that boat before you looked, did you?

The WITNESS. It is pretty hard to find the owners when you find a barge with alcohol; they wouldn't be in the vicinity anywhere.

Mr. WEINBERGER. I ask that be stricken out.

The COURT (to the witness). You will have to answer his questions.

Mr. WEINBERGER. Is that stricken out?

The COURT. Yes; that is stricken out. Let Mrs. Gulliver read the question, and you try to answer it directly.

(Question read.)

A. No.

The COURT. By the third boat I presume you mean the "Evelyn"?

Mr. WEINBERGER. The "Evelyn"; yes.

The WITNESS. Well, the——

247 Q. By the way——

The COURT. Just a minute. "The third boat" is confusing.

The WITNESS. There was several boats in the slip.

Q. Pardon me. The first boat you went on was the "Helen"?

A. Yes; there was nobody on that.

Q. Then you went on the "Doris"?

A. Yes.

Q. His Honor stated you didn't go on the "Evelyn"?

A. That is right.

Q. May I ask you this question, Mr. Carlsen. Did you talk to Mr. Rizzo?

A. I did.

Q. Who was the first one to talk to him that you saw?

A. The first one to talk to him was the customs inspector.

Q. What was his name?

A. Perosky.

Q. Could you hear the conversation?

A. I could.

Q. Didn't you go into the little room, didn't you go around inspecting on the boat to see what you could find?

A. On which boat?

Q. While he was talking to Rizzo, on the "Doris"?

A. On the "Doris" I did later after the customs inspector had Frank Rizzo under surveillance and had the conversation.

Q. Where was Rizzo under surveillance?

A. In the galley on the "Evelyn."

248 Q. That was an entirely different barge than you were on?

A. They were tied up close together.

Q. You could hear the conversation?

A. I was only three feet away because I saw Perasky first.

Q. What did the customs inspector say to Rizzo?

A. He asked him who he was.

Q. What did he say?

A. He said he was the watchman.

Q. You heard that, of course?

A. I heard that.

Q. What else did he say to him?
A. He said he was the watchman and——
Q. No; what else. Did he say he was a watchman for those boats?
A. He said he was a watchman for the "Evelyn."
Q. Say anything about the "Doris"?
A. Didn't say anything about the "Doris."
Q. Say anything about the——
A. "Helen", no.
Q. Did not?
A. No.
Q. Did he ask him what he was watchman for, what boats?
A. The "Evelyn."
Q. Did he ask him "what boats are you watchman for"?
A. He asked him, the only conversation I heard that he was the watchman, when he asked him who he was.
Q. Then you didn't hear the conversation in its entirety, did you?
A. Well, I heard him say he was the watchman.
Q. You didn't hear what he said he was watchman for, though, is that right?
249 A. Because when I came aboard I asked him——
Q. You didn't hear him say what he was watchman for, is that right?
A. He said he was watchman for the "Evelyn."
Q. Did he say for the "Evelyn"?
A. He said for the "Evelyn"; yes.
Q. You heard him say that?
A. Well, I am not positive about that he said "Evelyn" or if it was for three.
Q. Are you positive he didn't say he was watchman for the "Doris"?
A. No; he didn't say "Doris."
Q. For the "Helen"?
A. Yes.
Q. The "Helen"?
A. All I heard him say was that he was watchman.
Q. You didn't know for what?
A. No.
Q. You didn't hear what he said he was watchman for, is that right?
A. That is right.
Q. Now, as a matter of fact, did you speak to Rizzo before you went on the boat, the "Doris"?
A. Speak to Rizzo; no.
Q. Why not?
A. Why, because there was nobody aboard.
Q. What is that?
A. Because the customs had already had him in surveillance, they had the conversation with him.

Q. You didn't go up to speak to him, did you, before you went on the "Doris" to Rizzo, did you? What is your answer?

A. You can't——

Q. Yes or no?

A. No.

250 Q. I think you have already stated, am I right, you did say you had no search warrant?

A. Search warrant?

Q. Yes.

A. You don't need no search warrant.

The COURT. Well, you hadn't.

Mr. WEINBERGER. May I ask that be stricken out?

The COURT. Answer yes or no.

A. No.

Q. That is why we are here. You think you didn't need it.

The COURT. He said no.

Cross-examination by Mr. KESSLER:

Q. Didn't you examine the "Helen" and the "Evelyn"?

A. I did.

Q. What did you find on the "Evelyn"?

A. I found a small amount of alcohol in the aft starboard tank.

Q. In one tank?

A. Well, there was a little in all, but the starboard tank had the most in.

Q. How much did that have of the liquid?

A. Well, there was just a few gallons left in the angle irons and in the corners of the tanks there, I should say.

Q. Just in the corners and angle irons?

A. Yes; just in the corners and angle irons of the boat.

Q. And when you say one or two gallons in each place, or something of that kind, what do you mean?

A. In that aft starboard tank or the aft tank on the right-

251 hand side of the boat where I got the samples for the chemist, I should say there was about six or seven gallons in that tank, and the other ones was a little less, due to the boat, she was listed over, and I could get to the samples better on the starboard aft tank.

Q. That is on the "Evelyn"?

A. That is on the "Helen."

Q. What did you find on the "Evelyn," about the same?

A. I didn't draw any samples from the "Evelyn" because the customs inspector——

Q. I want to know what you did?

A. No. I inspected the "Doris."

Q. You didn't inspect the "Evelyn" at all, did you?

A. No; I did not.

Q. Don't you know, as a matter of fact, the entire libel is only for three gallons of alcohol in its entirety?

The COURT. Have you ever seen the libel filed in this case?
The WITNESS. No; I have not, your Honor.
Q. Mr. Carlsen, are you sure about the quantity you found?
A. Oh, yes.
Q. Did you measure the quantity?
A. I measured the quantity and I—there was three witnesses with me at the time.
Q. Did you make a record?
A. Three of my crew. I did.
Q. Did you make a record?
A. I did.
Q. Have you got the record with you?
A. Why, at the time I think I just have the initials of the witnesses.
Q. Have you got a record of the quantity you found?
252 A. I have made a seizure report.
Q. You think you made a record. Let's see if you have it, let's see what it shows?
A. Well, that is just for my own information [indicating].
Q. I don't care for whose information it is.
A. Well, from the "Helen", this is the witnesses.
Q. Never mind the witnesses. Did you make a record of the quantity?
A. About a half bucket of alcohol from the oil barge "Helen."
Q. About half a bucket. What kind of a bucket did you consider when you used that?
A. Well, standard size, standard-size bucket.
Q. Do you mean one of those water pails as we call them?
A. Yes.
Q. You have in mind a galvanized water pail?
A. Yes.
Q. And half of that?
A. About half of that; yes.
Q. You collected that in your bucket, did you not, as a matter of fact?
A. I collected that in the bucket; yes.
Q. You collected that from all parts of the boat as you described before in answer to my questions?
A. Yes.

Redirect examination by Mr. BESSON:

Q. I just wanted to ask one question. From how many of these boats did you take samples—name them, name the boats?
A. I took samples off of the "Helen" and the "Doris."
Q. And both of those samples were delivered to the chemist, as indicated?
A. To the chemist, yes; and analyzed.
253 Mr. BESSON. All right, that is all. I would like to recall Mr. Pernisco.

GEORGE PERNISCO, previously sworn, recalled.

Direct examination by Mr. BESSON:

Q. Now, Mr. Pernisco, you testified before in this proceeding you took a sample, did you not, from one of these boats?

A. I did.

Q. From which boat?

A. "Evelyn."

Q. What did you do with the sample?

A. Turned it over to the chemist.

Q. Where was the sample taken from?

A. The "Evelyn", tanker.

Q. What part of the tank?

A. Forward part.

Q. At the time, why did you search for the ship's papers on these boats?

Mr. WEINBERGER. Objected to.

The COURT. I don't know how he can tell why he did that.

Mr. BESSON. Your Honor permitted, I think, the state of mind——

The COURT. What?

Mr. BESSON. The other officer was asked by the defense counsel why he did go aboard the vessel.

Mr. WEINBERGER. That is cross-examination.

Mr. BESSON. I don't think the cross-examination gives him
254 any greater right than I would have to ask this man why he did search for the ship's papers.

Mr. WEINBERGER. I had a right to speculate on cross, but he certainly can't self-serve himself on direct.

Mr. BESSON. I am not self-serving myself.

Mr. WEINBERGER. That is all it is.

The COURT. I think it is objectionable to ask him why he made the search. He did it by virtue of some circumstances one way or the other, which he ought to describe.

Mr. WEINBERGER. His intention is certainly not material.

The COURT. No.

Mr. BESSON. Does your Honor overrule the question?

The COURT. Yes.

Mr. BESSON. That is all.

Cross-examination by Mr. KESSLER:

Q. May I ask you one question. You took a sample from the "Evelyn"?

A. I did.

Q. From where did you take it?

A. Forward hold.

Q. How much liquid did that ship contain?

A. It contained a quantity of liquor.

The COURT. He said how much?

The WITNESS. I don't know just how much, but a quantity.

Q. About how much is a quantity? You saw it, didn't you?

255 A. Yes; I did.

Q. You went down in the hold to get it, into the tank, I mean?

A. It must have been about six, seven inches of, about six or seven inches in the tank.

Q. Inches of what?

A. Liquid, of alcohol.

Q. Where was it located?

A. In the forward part, in the tank.

Q. In the forward tank?

A. Yes.

Q. Well, did it cover the whole bottom, six or seven inches on the whole bottom?

A. No; it come up on the slant, the bow up, it was aft of the tank.

Q. How much would you say in quantity it was, Mr. Witness?

A. I am no judge. I couldn't tell; I am no judge of quantity. I don't know just how much was on there.

Q. Did you think there was more than four and one-half gallons of alcohol?

A. I don't know.

Q. If I told you the Government charges in the libel it was four and one-half gallons, would you say, in your judgment, having seen it, whether or not that is correct?

A. Well, I have not measured it; I just took enough for a sample.

Q. You are the only one who gave the Government the information as to how much liquid there was contained in order to file the libel?

A. I didn't measure.

Q. You are the only man who gave the Government information on which to file this libel as to the quantity of the liquid contained in that tank?

A. Yes.

256 Q. The Government charges four and one-half gallons contained. You, having seen it contained in the entire boat, you having seen the boat, I ask you whether or not that is correct?

A. I couldn't answer that question because I have not measured it.

Q. The Government had no other information as to the contents of this boat excepting what you gave them, had they?

A. I just took a guess at it.

Q. Yes or no.

A. I just took a guess at that.

The COURT. Did you tell the Government four and one-half gallons?

The WITNESS. About.

The COURT. Put that in your report?

The WITNESS. Well, I don't remember now.
The COURT. But you did tell them about four and one-half gallons?
The WITNESS. About four, four and one-half, five.
Mr. KESSLER. That is all.

JOHN J. LYNCH, called on behalf of the Government, being duly sworn, testified as follows:

Direct examination by Mr. BESSON:

Q. Mr. Lynch, you were inspector of customs on December 12, 1932?

A. I was.

Q. In the course of your employment as such did you receive a message from Captain Chiswell, commander of the New York Division customs service?

257 A. I did.

Q. What time did you receive this message?

A. At 3:30 on December 12th.

Q. As a result of it, what did you do?

A. Why, I immediately, after receiving the information which was read over the wire to me, I went downstairs to Captain Chiswell's office and I asked him to let me see the letter, which he did. I then asked him to make me a copy of it, and while he was making this copy I called Station Inspector Polak, of the enforcement division——

Mr. WEINBERGER. I object.

A. And I told him I had some information——

Mr. WEINBERGER. One minute. I object.

The COURT (to the witness). Wait a minute. When they object better cease firing, inspector.

Mr. WEINBERGER. I object on the ground obviously this conversation between this gentleman and others is not evidential.

The COURT. Yes.

Q. Now, did you make an investigation of the residence of Frank Rizzo in Bayonne?

A. I did.

Q. At what address?

A. On December 27th, in company with Customs Agent Norwood——

Mr. BESSON. I will withdraw that question for the time being.

The COURT. All right.

Mr. WEINBERGER. I can't stop that, sir.

The COURT. Well, the Government sees fit to withdraw it.

Mr. WEINBERGER. We agree, for a change.

258 Mr. BESSON. I saw counsel preparing to object.

All right, that is all.

Mr. WEINBERGER. No questions.

(No cross-examination.)

SAMUEL POLAK, called on behalf of the Government, being duly sworn, testified as follows:

Direct examination by Mr. BESSON:

Q. Mr. Polak, were you employed as an inspector of the customs service of the United States on December 12, 1932?

A. I was.

Q. In the course of your employment that day did you receive a message from Inspector Lynch?

A. I did.

Q. As a consequence of it, what did you do?

A. I told Pernisco, who had charge of the "546"——

Q. Don't tell what you told him. You gave him some instructions?

A. I gave him the information.

Mr. BESSON. All right, that is all.

Mr. WEINBERGER. No questions.

The COURT. Is that all?

Mr. BESSON. That is all; yes sir.

(No cross-examination.)

259 LOUIS TANNER, called on behalf of the Government, being duly sworn, testified as follows:

Direct examination by Mr. BESSON:

Q. What is your occupation, Mr. Tanner?

A. I am a chemist of the United States Appraisers Stores, New York.

Q. Are you a graduate of any institutions of learning?

Mr. WEINBERGER. For the purposes of the record, if your Honor please—I will withdraw it, sir.

A. I am a graduate of the college of the City of New York, Columbia School of Engineering and the Massachusetts Institute of Technology.

Q. What degrees?

A. Master of Science, from the Massachusetts Institute of Technology in chemical engineering.

Q. You have been practicing as a chemist for how long?

A. Since 1924.

Mr. BESSON. Now, I have here, if your Honor please, four bottles which I would like to have marked for identification.

Four bottles marked G–5, 6, 7, and 8 for identification.

Q. Will you take this bottle, G–8 for identification, and tell us what it is. [Handing bottle to witness.]

A. The contents of this bottle——

Q. Don't tell us what the contents of the bottle is, tell us about the bottle, where you got it, what it is doing here?

A. This bottle was brought to me by Mr. Pernisco on December 14, 1932, for which I gave him a receipt and which I tested.

260 Q. You made a chemical analysis of it?
A. I made a chemical analysis of the contents.
Q. Since that time has the bottle been in your custody?
A. It has.
Q. You produced it here in court today?
A. Correct.
Q. What was the result of your analysis?

Colloquy

Mr. WEINBERGER. If your Honor please, may we say that the objection is made on the grounds heretofore urged that this inquiry is limited to the question of the propriety of the search and seizure, and for the purpose of expediting the examination may we say we will assume this witness will testify to whatever he is going to, but we desire to have our objection noted that it is immaterial to this inquiry because we are limited to the question of search and seizure.

Mr. KESSLER. The contents is alcohol.

Mr. BESSON. Grain alcohol fit for beverage purposes. I think it would take but a few minutes to get it on the record.

The COURT. No use if they admit it.

Mr. BESSON. Well, I want to show a sample was taken from each one of the vessels and each of the samples contains alcohol fit for use for beverage purposes.

Mr. WEINBERGER. We admit——

Mr. BESSON. Containing more than one-half of one per cent. of alcohol by volume.

Mr. WEINBERGER. We will admit the witness would testify to the tenor and purport suggested by the United States Attorney.

261 The COURT. Reserving your right of objection.

Mr. WEINBERGER. As to propriety, as to its evidential value in this proceeding.

The COURT. Yes.

Mr. BESSON. If that is the understanding that all of these vessels had alcohol on them fit for beverage purposes——

Mr. WEINBERGER. This witness would not testify to that.

Mr. BESSON. That these samples——

Mr. WEINBERGER. Yes; these samples. We will keep the vessels out, if your Honor please, because the other witness——

Mr. BESSON. I want to then trace where these samples come from. He won't admit that so I have to trace it.

Mr. KESSLER. It is admitted.

Mr. WEINBERGER. I think the witness said he got that from Mr. Pernisco, and if he got it from anybody else and he so states, we have no objection as coming from those vessels, there is no objection that he would so testify.

Mr. BESSON. This bottle I would have to call Pernisco back to show this bottle marked G–8 for identification was the bottle taken from the *Evelyn*.

Mr. WEINBERGER. We waive the necessity of proving that and will also stipulate he would testify to that effect subject to our same objection.

The COURT. All right.

262 Mr. BESSON. That is clearly understood, then, on the record, from the *Evelyn*, the *Doris*——

Mr. KESSLER. We make no point as to the technical proof as to this liquor and the source it came from, so there will be no argument about it.

Mr. BESSON. And the *Helen*.

The COURT. All right.

Mr. BESSON. The permit man is not here yet, but he will come.

As I understand, counsel admits that there was no permit to transport alcohol on these vessels, that is that would be the testimony of the Government Agent in charge of permits governing a case of this kind.

Mr. WEINBERGER. If your Honor please, as I understand it, Mr. Besson says, and we agree, that the testimony which would be given by this witness would be in the nature as stated by Mr. Besson. We waive the necessity of bringing the witness here and we consent that that would be regarded as his testimony subject to the objection which we claim goes to all of these points, namely, that it is not within the purview of the issues raised under the search and seizure.

The COURT. Very well.

Mr. BESSON. In other words, counsel do not claim that this liquor was carried under a permit.

Mr. HALLE. We don't claim that, that is wrong.

Mr. KESSLER. We don't claim or concede it.

The COURT. They concede that if the permit man would ap-

263 pear here he would testify to the tenor and purport of the statement that you made, that you indicated would be his testimony.

Mr. HALLE. Subject to our general objection.

The COURT. Subject to your general objection.

Mr. HALLE. That the evidence should be suppressed.

Mr. BESSON. With respect to all three of these vessels.

Mr. WEINBERGER. That is correct.

Again for the record, sir, subject to the limitation of the inquiry and the further fact, if your Honor please, that under the law as I understand it, this evidence should be suppressed if it was the subject matter of an illegal search and seizure and would therefore not be evidential.

The COURT. That is right.

Mr. WEINBERGER. Do you rest?

Mr. BESSON. Yes.

Mr. WEINBERGER. Now, if your Honor please, on the question of the offer made as to the exhibits going in, I think that——

Mr. BESSON. I do want to offer the exhibits in evidence; there are five exhibits.

Mr. WEINBERGER. Also the liquor here, or alcohol.

Mr. BESSON. G-1, 2, 3, 4, and 5.

Mr. WEINBERGER. What are they?

Mr. BESSON. The ship's papers and a letter and envelope.

Mr. KESSLER. The letter is objected to and your Honor ruled it out.

264 The COURT. Hasn't it been offered?

Mr. KESSLER. Yes; it has been offered and ruled out.

Mr. BESSON. I offer these.

Mr. WEINBERGER. They are objected to, and I think that brings the question before the Court. This objection is being made now on the question of the alcohol [redacted] as an exhibit. We object to it on the ground that the manner [redacted] it was procured under the evidence was clearly illegal and vio[redacted]of the constitutional rights of the claimant in this case, and the[redacted]e should not be admitted in evidence, and that, sir, presents the question of law which we raise in this case, namely, that ab initio the search was illegal, the seizure was illegal and void, and therefore everything obtained as a result thereof should of necessity be legally suppressed.

The COURT. Is that all the testimony both sides choose to offer in this case?

Mr. KESSLER. Yes, sir.

Mr. BESSON. Of course, the alcohol is treated as if it were in evidence.

Mr. KESSLER. Subject to the objection.

Mr. WEINBERGER. That is subject to your Honor's ruling now.

The point I make, and I think the cases hold, the Goodhue case and others, the question your Honor must find before it becomes evidential is this, is it legally an item that can be offered when it was gotten in the manner which the evidence discloses it was gotten?

Now, we say as a matter of law, if your Honor please, that
265 the reading of the record in this case clearly establishes, first, the fact that without probable cause in a manner in clear contravention of law they boarded these vessels, illegally maneuvered on them, not alone maneuvered on them, but went to places they had no right to go, opened things they had no right to open, and discovered things they had no right to discover from the outset, and therefore these matters which are now being offered in evidence should be suppressed and not regarded as evidence against the defendant, and I have ever so many cases.

May I say this: I don't think the United States Attorney can point to one case—and that is a rather broad statement, with our differentiation of opinion in the Federal districts—that would justify this particular search and seizure under the evidence given by the witnesses.

The COURT. All right, now, Mr. Weinberger, I am going to admit these papers and things into evidence because I don't regard this as the trial whereby you can be prejudiced by the admission of that evidence. I think the Court has a right to have the whole picture of

what has occurred to decide whether this is legal evidence or not. If this were the trial of the issues with the jury here, I would say you would have a right to have that ruled out. The question here is, is the evidence legally taken. I have a right to know what was taken.

Mr. WEINBERGER. When I raise the point I am only raising it for the purpose of having on the record that we raised the point.

The COURT. Over your objection I am going to admit that into evidence to decide this question of whether this evidence should
266 be suppressed, and under the libel, and also on the basis of a motion to suppress, both ways.

Now, do I understand there is going to be any more testimony introduced? You have rested for the Government?

Mr. BESSON. Yes, sir.

The COURT. All right.

(Exhibits G–1, G–2, G–3, G–5, G–6, G–7, and G–8 for identification received in evidence.)

Mr. BESSON. There are two other little certificates of temporary inspection which I think are contained in there, but I don't think they have any bearing.

Mr. HALLE. Your Honor, with reference to two of the boats that Mr. Kessler and myself appear in——

The COURT. Is there going to be any further testimony?

Mr. BESSON. Are we going into the libel now? Counsel has been talking about the seizure. Now, you take up the libel.

Mr. HALLE. I thought we were through talking about that.

Mr. WEINBERGER. I am through. As far as we are concerned, all our evidence is in. I assumed the Government has closed.

The COURT. Mr. Besson announces he has closed.

Mr. BESSON. Yes.

Mr. WEINBERGER. We are closed.

Mr. BESSON. All right. What I want to say is this, there is nothing before the Court to show that any one has any status here to claim this property.

267 Mr. WEINBERGER. Is that argument now? We have closed the case.

The COURT. Yes. I assume it is argument.

Mr. WEINBERGER. If it is argument, we will be glad to be heard on it.

Mr. BESSON. Of course, they are the moving parties.

The COURT. What is that?

Mr. BESSON. May I call on them for an ening?

Mr. WEINBERGER. Mr. Besson moved. I suppose he speaks first.

Mr. BESSON. I have a right to call on the moving party for an opening as to their theory if I choose.

The COURT. Well, what difference does it make?

Mr. Besson, suppose you carry on and make your argument on this. As I see it, from your last remark there is going to be the important phase of this case as far as I can judge it. I am not so

reticent about making suggestions, Mr. Weinberger, of what seems important to me.

Mr. WEINBERGER. May I say to your Honor, I want to see that your Honor undoubtedly has what is troubling the mind of the United States Attorney and we are glad to answer it. I want to hear what he has to say first.

The COURT. Go ahead, Mr. Besson.

Mr. BESSON. May it please the Court——

The COURT. Let me help you out, Mr. Besson, without com-
268 mitting myself on the question of the seizure. I don't think there is anything legal about the seizure itself under the cases as I read them, but there is a question in my mind as to the ownership here. A man named Rizzo files a claim as owner. There is testimony corroborative on the part of the Government that Rizzo was there, the man who filed the claim, and said he was a watchman who got $5 a day. Now, he claims to own 150,000 gallons of alcohol. That is the question I want to hear counsel on. If he was a watchman and got $5 a day, I don't think he could own 150,000 gallons of alcohol, even at the depreciated prices of today, and if that is so then he has not any right to claim, and he can't complain of any illegality of the Government seizure.

Now, don't let's dance around the problem any more. Let's get down to it and let's study it. Is that the position the Government takes?

Mr. BESSON. That was the position the Government took in regard to that, without conceding there was no basis for seizing the vessel.

Mr. HALLE. If your Honor please, Rizzo was in possession, he was the bailee in possession on the Government's own testimony. The Government arrested him for that reason.

The other day there was a case handed down by the United States Supreme Court called the "Mazeltov" case. Now, in that case the Court, in its opinion, states that the master of the vessel made the claim for both the vessel and the cargo as bailee in possession, and they upheld his claim in that case there. No question was raised there. Now——

The COURT. Was the question raised, Mr. Halle, or was the
269 case decided on the theory that the treaty between the United States and Canada could not be set aside by the passage of a statute?

Mr. HALLE. Surely, your Honor, but after all we must assume that the Court passes on everything that is before it, even though counsel don't raise it; but it is enough to say that the Supreme Court, knowing that the master made the claim for the boat and the cargo, did not say, "Well, he may be right under that one hour's distance or the treaty, but he is not the owner", just as we say here the search and seizure is not illegal, but who is Rizzo?

The COURT. Now, Mr. Halle, before you go any further, that will bear investigation. Did the master make the claim when he made

the claim as master of the vessel and bailee in possession, as you say, or did he say in his claim falsely, as it must have been, "I am the owner, bona fide, of the 'Mazeltov'?" Do you get the distinction?

Mr. HALLE. Yes, your Honor.

The COURT. Here, if Rizzo had said in his claim, "I was the watchman and bailee in possession of this alcohol", there would not be any question about it, but he does not say that; he says in his claim, under oath, "I was the owner, bona fide, in good faith."

Mr. HALLE. One is not inconsistent with the other.

The COURT. I hope that the watchman of my premises when such premises are left in his possession does not go about saying he is the owner in good faith of my property.

Mr. HALLE. Well now, your Honor, there is such a thing as
270 legal ownership and equitable ownership. We have had any number of cases where vessels have been placed in the legal ownership of individuals, and they didn't own a penny's worth in it, and the Court said that the legal owner was the only one that could come forward and claim that property. There has been any number of cases on that. Take the Gambino case where the Court ruled that the driver of a truck has a right to claim illegal search and seizure. In that case he was the driver.

The COURT. Again, that case was decided on much broader principles than the narrow-gauge issue that you now cite, Mr. Halle. The Gambino case was decided on the question of the right of a State policeman to make a search and seizure for the United States Government.

Mr. HALLE. Yes; that is it.

The COURT. But let us not get into this thing orally any further.

Mr. HALLE. Very well.

The COURT. It is going to require some research by the Court.

Mr. HALLE. Very well.

The COURT. Unless you have something specifically that you want to raise.

I will call your attention specifically to this, Mr. Besson, that on the part of Mr. Kessler's clients, the owners of these vessels, there is not the slightest scrap of testimony in the Government's case that is inconsistent with the duly filed claim.

Mr. BESSON. Do I undertand, your Honor, that there is not any proof offered by them either as to that?

271 Mr. KESSLER. The papers are here showing we are the owners.

Mr. HALLE. With reference to the two boats, there is one boat that has four gallons of alcohol on it and one six gallons, which apparently was scraped together somewhere, four and one-half and three gallons.

The COURT. Suppose you brief it, give me some cases on the points involved. You, Mr. Besson, if you think you can justify the seizure otherwise than on the question of ownership, and you gentlemen for

the owners, give special attention to the question of ownership. Get the briefs to me as quickly as you can and I will give you a decision as quickly as I can.

Do I understand this is being stored at Government expense somewhere?

Mr. HALLE. It is still in the boat.

The COURT. Where is the boat?

Mr. O'KEEFE. Hoboken.

Mr. BESSON. Isn't anybody paying demurrage on the boats?

Mr. HALLE. No.

The COURT. Got guards on them?

Mr. O'KEEFE. Twelve guards a day, customs guards.

The COURT. How much are they paid?

Mr. O'KEEFE. Four guards in each boat, twelve guards a day.

Mr. BESSON. That is costing money.

Mr. O'KEEFE. That is costing $100 a day.

272 The COURT. Then I suggest a little haste. That is a lot of money, Mr. O'Keefe.

Mr. O'KEEFE. It certainly is; we agree with you, your Honor.

The COURT. Have you applied to get these boats out on bond?

Mr. HALLE. That is just what I wanted to bring to your Honor's attention. With reference to two boats, I think if the Court—the only reason for holding only two of these boats is one had three gallons on board and the other four and one-half gallons, and that that was a violation of the boat's license. I am discussing just the practical side of these two cases, that a boat which has three gallons of alcohol on it was being used in violation of the boat's license under Section 4377 of carrying cargo in violation of its license. I submit that irrespective of any question that is involved here, aside from all those questions the Government could never hope to sustain these two libels.

The COURT. What is the practical solution about this, $100 a day of yours and yours and my money.

Mr. HALLE. It wouldn't take twelve guards to watch one boat.

Mr. O'KEEFE. We don't think twelve guards are enough where they are stored down there.

The COURT. Is there any solution to this thing insofar as the guards are concerned?

Mr. O'KEEFE. I think the collector is under the opinion he has been restrained from moving that particular boat.

The COURT. Well, I know.

273 Mr. BESSON. I don't think he really should remove it from the boat during this litigation right away, at any rate, because this matter will be decided very shortly.

The COURT. That is agreeable to me. I will give you an opinion as quickly as I can on receipt of the briefs, but my experience has been that another two or three weeks will probably elapse, and that is $2,100. I don't know how you gentlemen feel about it but on the pay of a Federal judge $2,100 looms rather large.

Mr. KESSLER. Does Mr. O'Keefe think if two boats were released, the other boat you would still require twelve guards for?

Mr. O'KEEFE. The other two boats are not expensive.

Mr. KESSLER. Do you want this boat question briefed as well?

The COURT. Yes; I want to dispose of the whole matter.

Mr. BESSON. Counsel have libels filed or claims filed, and I don't think they have been obliged to file under the stipulation for $250. I think they could file a larger amount of bond to secure the Government, and I so move. As to the other two boats, they can move to bail them out.

The COURT. It is a remedy only in the event you win. What I am seeking is a practical remedy. If it does not exist, all right.

Can you get me a brief on your side?

Mr. WEINBERGER. Yes; very quickly.

This $5 a day being inconsistent, I think your Honor will find that was all stricken out because when the witness started off——

274 Mr. KESSLER. The man who really talked.

Mr. WEINBERGER. Never said $5 a day. I am sure that element is out of the case. I am trying to get a decision now.

The COURT. I am not going to give you a decision now. It is too important.

Mr. WEINBERGER. A bailee, in my opinion, and with respect to my learned colleague on the right, a bailee can never question the bailor's title. The United States Government cannot question the title of a person from whom they take things. To me, I don't understand where he overlooks that important question. I thought he would convince your Honor in a minute. I am in possession, they take from me, no one asserts a claim to anything here except me.

Mr. HALLE. The authorities bear us out.

The COURT. I am not prepared to agree with you on that now. I can be shown, perhaps.

Mr. KESSLER. May I suggest the record is so devoid of anything with relation to the boats that I have nothing to answer.

The COURT. All right. Say that.

275 FINAL HEARING

Before Honorable Phillip Forman, Judge, on Thursday, March 30, 1933, in the Post Office Building, at Trenton, New Jersey.

Appearances: Honorable Harlan Besson, for the Government; Minturn & Weinberger, Esqs., by Harry H. Weinberger, Esq., and Louis Halle, Esq., for Frank Rizzo; Kessler & Kessler, Esqs., by Samuel I. Kessler, Esq., for Matoil Service & Transport Company, Inc.

Mr. KESSLER. I would suggest, instead of going over the same testimony that now appears on the preliminary motion, that that be considered part of this record and we add to it on either side whatever we think necessary.

The COURT. Yes.

Mr. BESSON. I understand in the order of proof in the case of U. S. v. 422 Casks of Wine that it would be incumbent upon the claimant to establish his status.

The COURT. Yes.

Mr. BESSON. As a preliminary question.

The COURT. That is what I held.

Mr. BESSON. And the burden would be upon him to do so.

The COURT. Yes.

Mr. BESSON. There is nothing in the record on that, of course.

276 The COURT. That is what they are going to do, as I understand it.

Mr. BESSON. It may be that that question having been presented, testimony on that point having been presented, it might be the rest of the case could be contained in the pleadings or in the testimony already taken.

The COURT. I think your main case, Mr. Besson, is in practically. You will say you will rest on your case with such addition as you care to make today. It would be foolhardy to take this testimony all over.

Mr. BESSON. It would be a repetition.

Mr. KESSLER. It will appear in the record the testimony heretofore taken on the 30th of December 1932, and also the testimony taken on the 27th day of January 1933 shall be considered as part of this record in the final hearing.

Mr. BESSON. With the limitation that, except that which is not pertinent to the pleadings and with the further limitation that it is in no way a waiver of the insistment on the part of the United States that the claimant or claimants shall establish his or their respective status.

The COURT. You don't need to have much worry about it because the Court has held with you on that.

Mr. BESSON. Yes.

The COURT. That is Mr. Kessler's worry and his associates' worry now. I suppose they want on the record something that will reserve to them the right of appeal from that phase of the decision.

I don't know that you need to take any exception in an ad-

277 miralty proceeding, but if you do, it is granted to you anyway. Better take it so as to be perfectly safe.

(Claimant's counsel prays an exception, which is hereby allowed and sealed accordingly.) (Sealed.)

JOHN T. HUGHES, called on behalf of the claimants, being duly sworn, testified as follows:

Direct examination by Mr. KESSLER:

Q. What is your business, sir?

A. Vice president and general manager in charge of construction.

Q. Of the Matoil——

A. The Matoil Service and Transport.

Q. Are you familiar with the ships, three ships, the motor barge "Evelyn", the barge "Helen", and the barge the "Doris"?

A. Yes, sir.

Q. Do you know who built those ships?

A. The Staten Island, the United Dry Dock, Staten Island plant, Arlington?

Q. Do you know for whom they were built?

A. The Matoil Service and Transport.

Q. That is your company?

A. Yes, sir.

Q. Do you hold a bill of sale from these three ships in question?

A. Yes.

Q. I show you three bills of sales and ask you if those are the bills of sales?

A. Yes; those are the bills of sales passed from the United Dry Dock to the Matoil Service.

Q. And were they the builders of the ships?

A. Yes, sir.

278 Mr. KESSLER. I offer these three bills of sale in evidence.

(Papers received and marked Exhibits C–1, C–2, and C–3.)

The COURT. The "Evelyn" is the tug, isn't it?

The WITNESS. Yes, sir.

Q. Which one is the motor boat, the "Evelyn"?

The COURT. That is the tug.

Mr. KESSLER. Oh, yes; that is right.

The COURT. Call it a motor screw.

Q. You say you are in charge of construction. Were these three boats constructed under your supervision?

Mr. BESSON. Are these originals or copies?. [Referring to C–1, C–2, and C–3.]

Mr. KESSLER. Those are the originals. That is the whole bill of sale.

Q. In addition to the bills of sales, did you receive——

Mr. BESSON. I would like to object; it may come too late; I would like to enter an objection to their going into evidence. These seem to be papers that are not attested by anyone, ostensibly on the form of a bill of sale, but really unsigned.

Mr. KESSLER. Not at all, your Honor.

The COURT. Let me see them.

Mr. KESSLER. The paper does not show that.

Mr. BESSON. No notary public has taken any acknowledgment.

Mr. KESSLER. There is no necessity under the law for that.

279 Mr. BESSON. I think there is.

Mr. KESSLER. I would be surprised if that is so.

(The Court examines the exhibits.)

The COURT. Mr. Kessler, referring to the purported bill of sale of, say, the barge "Doris", you don't press that this folded document headed "Kirkland and Schneider" has any value whatsoever, do you?

Mr. KESSLER. Only attached to the paper. The real bill of sale is in the form of the letter. That is the way we got it. It is the one paper. I think we are entitled to offer it as is.

Your honor particularly, sitting without a jury, will take into consideration that——

The WITNESS. May I explain that?

Mr. KESSLER. You may in a moment.

The COURT. Yes, why?

Q. Can you explain these bills of sales?

A. Your Honor, on new construction there is no bill of sale passed, only a builder's certificate from the builders to the owners. The builder's certificate is deposited in the customs house. The boat's license is obtained from that, and they give a letter or a receipt in the form of a bill of sale to the owners. I believe a paper——

Q. Are these the three licenses issued on the deposited certificates [indicating]?

A. I believe they are. These are given to the Government.

Q. I am showing the witness Exhibits G–1, 2, and 3 offered by the Government.

A. These, your Honor, as far as the United States Government are concerned, having received the documented vessels, the vessels for document, and the other which I said before substantiates these papers, it shows it is new construction.

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The COURT. How do you account for the fact that this bill of sale apparently is all made out ready to be executed apparently with the signature of the United Dry Docks Incorporated, referring to, say, C–3 for identification——

Mark these for identification.

(C–1, 2, and 3 marked for identification.)

The COURT. How do you account for the fact it is not executed.

The WITNESS. United Dry Dock claimed it was not necessary to give any bill of sale, but I had them make up a bill of sale which they give this form here with their letter attached to it.

The COURT. When did you have them make it up?

The WITNESS. When the boat was completed.

The COURT. When was the boat completed?

A. Around the 21st of September or a day thereafter, about that date, I believe. I have a memorandum here of the last date of construction. [Referring to paper.] September 21st was the last work on the boats. About that time.

The COURT. And is this the paper they gave you which is supposed to show your title to the boat?

The WITNESS. Yes, sir.

The COURT. If you know, can you tell me why they didn't sign this paper?

The WITNESS. No, I don't know, only that they said in the beginning of the conversation no bill of sale was necessary, inasmuch as it was new construction. In order to have the

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files correct we sent those bills of sales to them and that is the way they sent them back, and it was entered in the files accordingly.

Mr. KESSLER. Your Honor, the shipowner could not give title to a boat, because they never owned the boat.

The WITNESS. Brand-new construction.

Mr. KESSLER. It is different from buying a boat.

The COURT. Who is the vice president of the company, do you know—the United Dry Docks, Inc.?

The WITNESS. I believe a man by the name of Hallock, if I am not mistaken. I might be wrong on that. I just don't know his title.

The COURT. This receipt is signed by a man named George H. Bates as vice president.

The WITNESS. George H. Bates is the vice president, because I met the man and was introduced to him personally.

Mr. KESSLER. It also appears Hallock is a vice president. I have other papers to show it, your Honor.

The COURT. Let me see those documents admitted in evidence.

Mr. KESSLER. May I suggest for the record, as well as off the record, the Government would not issue these papers unless the indicia of ownership were delivered to the Government originally before they would issue a certificate.

Mr. HALLE. It has been held it is prima-facie evidence of ownership.

282 The WITNESS. They are made up from the builder's certificate from the builder to the owner through the broker.

The COURT. Do you refer to this [indicating C–3] as the builder's certificate?

Mr. KESSLER. No; your Honor. The builder's certificate is deposited with the Government.

The WITNESS. With the Government.

Mr. KESSLER. Upon which they issued G–1, 2, and 3; otherwise they would not issue it unless the certificate was filed with them.

The WITNESS. The builder's certificate has to be filed and these are issued from the builder's certificate.

Mr. KESSLER. Meaning Exhibits G–1, 2, and 3.

The COURT. Again referring to C–3, that is the only paper that is delivered to you by the United Dry Docks, Inc., the builders of the boats, indicating that you have paid the United Dry Docks for the boats.

The WITNESS. Yes, sir.

The COURT. Is that so?

The WITNESS. Yes, sir.

The COURT. You have no other paper?

The WITNESS. No.

By Mr. KESSLER:

Q. You did get other papers which you deposited with the Government?

The WITNESS. I explained those before.

The COURT. Other than the builder's certificate.

283 By Mr. KESSLER:

Q. In addition to that did you get bonds showing the builders had paid for the boat to your company? I show you these bonds from the United States Guarantee Company.

A. Yes.

Q. They were bonds from the builders to the Matoil Company showing the builder had paid for everything that was put into the boat?

A. That is right.

Mr. KESSLER. I offer these bonds in evidence.

Mr. BESSON. Wait a moment.

The COURT. Wait until he gets a chance to state his objection to the other papers first.

Mr. KESSLER. Oh, yes.

Mr. BESSON. As to the other papers, I object to them as not having been properly proven. There is no identification of the signature of Mr. Bates, said to be vice president of the United Dry Docks, Inc. As I understand it, just as has been indicated on this bill of sale, the practice is to record these sales with the customs house in New York or in the district in which the transfer takes place, in much the same fashion that a deed is recorded.

The COURT. He says it was not a sale. He said he ordered these boats built.

Mr. KESSLER. I have the contracts here to show they were being built for us. I am going to offer those in a moment.

Mr. BESSON. I object to this present form of proof; I mean because if it is not a sale, it is nothing, if it is not a bill of sale it is nothing, it is no evidence of anything.

284 The COURT. He says it is his receipt that he got for the boat. I don't think that the blank form means anything.

Mr. KESSLER. I agree with your Honor on that, except we have offered it because it is attached. That is the way we received it.

Mr. BESSON. The language of this receipt is a dollar and other valuable consideration was received in full payment for a barge built at a certain time. If that is not a transfer, proposed method of transferring something, what does it mean?

The COURT. It means he paid a dollar and something to have a barge built.

Mr. BESSON. Then it says ownership to said barge now vests in the Matoil Service and Transport Company.

Mr. KESSLER. The witness explained that; that the practice has not been to give a bill of sale, but they insisted on something and that is what they got.

The COURT. I assume it would be possible to bring Mr. Bates here to authenticate the signature to that certificate.

Mr. KESSLER. No trouble about that, but we would have to bring him in from Long Island.

Mr. BESSON. It is a necessary requisite to the transfer of title that there be a bill of sale recorded with the customs house.

The COURT. You should show that.

Mr. KESSLER. If the Government thinks that is the law it ought to show it.

The COURT. That is right. I have asked him to show it.

285 Mr. KESSLER. I didn't hear that.

Mr. BESSON. I would like to try to show that.

The COURT. All right.

Mr. BESSON. May I have a minute?

The COURT. Surely.

Mr. KESSLER. Can't your Honor take it subject to its later on being shown instead of to waste time now?

The COURT. You didn't bring anybody here from the people that built the boat, did you?

Mr. KESSLER. No. We have all their contracts. [Books were sent for.]

Mr. BESSON. In Corpus Juris under the topic "shipping", volume 58, on page 60, it is stated:

"In a criminal prosecution for an offense against the registration laws, the registry of a vessel is no evidence of ownership by a citizen of the United States."

And then it goes further here to say:

"The enrollment of a vessel is not evidence of a higher nature than a registry. It is not admissible, as evidence of property, either in favor of or against persons named therein as part owners, who were not instrumental in procuring it to be made, and who have neither authorized nor assented to it."

It goes further on to say on page 61:

"A bill of sale is the customary document by which the ownership of vessels is evidence, and therefore is competent evidence of title in the purchaser, and when accompanied by possession is

286 prima facie evidence of title or ownership, but is not conclusive. A bill of sale has been held not admissible as evidence of title where it is not recorded as required by statute."

Now in support of the text, the case of La Conception, 6 Wheaton Reports, at page 235, also in 5 Law Edition 249, is cited, and in that case, Justice Story, in delivering the opinion of the Court, said in part:

"A bill of sale is the customary and universal document by which the ownership of vessels is evidenced; and the want of any document of this nature, or of any direct and positive evidence of an actual sale, leaves no doubt in the mind of the Court that no such sale was ever made."

Now, title 46 of the U. S. Code Annotated, Sec. 921, page 318, contains a provision with respect to the transfer of title of vessels, and that provision reads as follows:

"No sale, conveyance, or mortgage which, at the time such sale, conveyance, or mortgage is made, includes a vessel of the United States, or any portion thereof, as the whole or any part of the property sold, conveyed, or mortgaged shall be valid, in respect to such vessel, against any person other than the grantor or mortgagor, his heir or devisee, and a person having actual notice thereof, until such bill of sale, conveyance, or mortgage is recorded in the office of the collector of customs of the port of documentation of such vessel, as provided in subdivision (b) of this subsection."

Then subdivision (b) provides:

"Such collector of customs shall record bills of sale, conveyances, and mortgages, delivered to him, in the order of their
287 reception, in books to be kept for that purpose and indexed to show—(1) The name of the vessel; (2) The names of the parties to the sale, conveyance, or mortgage; (3) The time and date of reception of the instrument; (4) The interest in the vessel so sold, conveyed, or mortgaged; and (5) The amount and date of maturity of the mortgage."

Now, under that section I would respectfully submit that those papers are not evidential, and also under the authorities cited.

The COURT. Do you think that applies to a situation where a boat is built for a purchaser?

Mr. BESSON. Yes; I do, and not only that but the United States in this proceeding as to this vessel is a third party.

The COURT. Do you think, Mr. Besson, that in the event that even that statute would be conceded control, as you say, suppose that no recording had been had of the bill of sale, do you think an owner is thereby prevented from showing ownership?

Mr. BESSON. It is prevented showing it as to third persons. The statute says so, but he is not prevented as to showing it between himself and the grantor.

The COURT. Right.

I will tell you what I will do, gentlemen. You may have these all marked for identification, all these documents, I think they are pertinent to your ownership, and then with the understanding that you will produce somebody here from the boat building corporation who will then be able to testify to the manufacture, in which event we will let them go into evidence.

288 Mr. KESSLER. I don't think it is necessary to do that, but if you think so it is only a matter of time. We will produce him if after we put all these in your Honor still thinks it is necessary to produce him.

The COURT. Let them be marked for identification now.

Mr. KESSLER. All right.

The COURT. And then you can produce somebody—with the understanding you will produce somebody from the boat building concern who will identify them as authentic from them, I think then I will let them in evidence.

Mr. KESSLER. Let me call your Honor's attention to this thought, suppose this company built the boats for themselves, from whom could they get a bill of sale? That cannot apply, what the prosecutor says. We could not give ourselves a bill of sale. Here is a man that builds it for us. Title is always in us.

The COURT. I think that is right.

Mr. BESSON. I don't think the title is in them according to even the language of that document that they have there.

Mr. KESSLER. Let me put the further proof in.

Mr. BESSON. I don't think there is any proof that the title changed.

Mr. KESSLER. I should like to offer at the same time these two bonds which were delivered simultaneously or within a reasonable time thereafter, showing the building for us of these boats.

289 Mr. BESSON. I object to their being admitted in evidence at this time, and under this method of proof.

Mr. KESSLER. What is your objection?

The COURT. Let us see.

Mr. BESSON. They are not properly proven. There is nobody here that had anything to do with these boats. You produced them and that is all.

Mr. KESSLER. All right. We will prove the signature.

Mr. BESSON. You could not offer them.

The COURT. Will the same person who comes down on behalf——

Mr. KESSLER. I think we can prove the signature now.

The COURT. All right.

By Mr. KESSLER:

Q. I show you two bonds and ask you what they are, referring to bonds bearing heading "United States Guarantee Co.," what are these two bonds [indicating]?

A. Two performance bonds.

Q. Whom did you get them from?

A. The United Dry Docks,

Q. I see the signatures borne there of Mr. Hallock. Do you know his signature?

A. C. S. Hallock.

Q. Do you know his signature?

A. Yes.

Mr. BESSON. I object to that. I suppose it is the purpose of counsel to endeavor to offer them in evidence by some circuitous method. I submit there is a regular method of proving documents of that kind and by the witness, subscribing witness.

290 Mr. KESSLER. That is not necessary, your Honor. Anybody who knows the signature, supposing the subscribing witness is not available, he is out of the jurisdiction, as a matter of fact. Anybody can prove it who knows the signature, and particularly the man who saw him sign.

The COURT. Let him cross-examine.

Mr. BESSON. Produce some citation on that.

The COURT. Cross-examine him as to whether he knows the signature of Mr. Hallock.

Mr. BESSON. I made the objection, if your Honor please, to the questions, I mean to questioning the witness or endeavoring to prove this document in that way.

The COURT. I think if you can prove you know the signature, you can prove a document by the proof of knowledge of the signature of the person who signed it.

Mr. BESSON. I understand the rule to be you must prove a document of this kind by the subscribing witness.

The COURT. Suppose he is dead.

Mr. BESSON. Well, then, that affords the basis upon which secondary evidence may be used. Until that has been established, that there is some foundation for the use of secondary evidence——

Mr. KESSLER. This is not secondary evidence.

Mr. BESSON. Secondary evidence cannot be used.

Mr. KESSLER. We agree with that proposition of law, but this is not secondary evidence.

291 The COURT. I don't know why you need the bonds anyway.

Mr. KESSLER. Because of what your Honor had already suggested in a question.

The COURT. That will apply to these alleged bills of sale.

Mr. KESSLER. Here is a guarantee bond issued by a company at or about the same time these bills of sales were issued.

The COURT. It is certainly cumulative.

Mr. KESSLER. It is that.

The COURT. That proof of ownership, and if we just have this one boy who can identify Mr. Bates' signature here saying, "We built this boat, I am an official of the company, my company built this boat for this Matoil outfit, and here is the bill of sale we gave them, it is a funny bill of sale, it has no corporate seal on it and has no signature, but that is what we gave them", it seems to me he would be competent to prove that transaction.

Mr. BESSON. But, of course, subject——

The COURT. I will allow you time to get him here.

Mr. KESSLER. I make the offer of these bonds. It is cumulative but I think we have a right to show it.

The COURT. I don't think you need the bonds in. I won't let them go into evidence.

Mr. KESSLER. Very well.

By Mr. KESSLER:

Q. Now, Mr. Hughes, I show you what purports to be a
292 contract between the United Dry Docks, Inc., and the Matoil Co. and ask you what contract that is? [Handing paper to witness.]

A. That is the contract for the construction of the two tow barges.

Q. Known as what?

Mr. BESSON. I object to that, characterizing the document.

The COURT. Yes. The objection is sustained.

A. It is for construction of the barges.

The COURT. By whom was the contract signed?

Mr. KESSLER. By the United Dry Dock Co. He knows the signature of the man and our company, he knows our signature.

The COURT. Well, you can produce it from his possession.

Q. Do you know Mr. Hallock's signature?

A. C. S. Hallock, yes.

Mr. BESSON. I make the same objection I did before as to this method of proof.

Mr. KESSLER. There is no subscribing witness to that, so I think your objection will have to be something else.

Mr. BESSON. I object to a method of proof of a contract by somebody who merely knows the signature of a person. In the first place, the man is not or there is no evidence to show he is a handwriting expert, that he has made comparisons of signatures, that he was present at the time. For all I know this may be a forgery. The method of proving it is improper.

The COURT. All right.

293 By the COURT:

Q. How long have you been vice president and general manager of the Matoil Service and Transport Co., sir?

A. Why, since July [referring to paper], prior to July 19th.

Q. Of what year?

A. 1932.

Q. Prior to July?

A. That is before, I should say.

Q. Aren't you the vice president now and general manager?

A. Vice president and general manager in charge of construction.

Q. Now?

A. Yes, sir.

Q. At the present time?

A. Yes, sir.

Q. And you went with them on July 19, 1932?

A. Yes, sir, July 19th or prior to that, maybe a week or two before that, it might have been a month before that. I was following up all this work before the actual construction started. On the 19th I went to the construction. I followed the construction until the construction was completed.

Q. Were you employed by the Matoil Co. in some other capacity than vice president and general manager before the 19th of July, 1932?

A. As I said, your Honor, it might have been a week or a month before that.

The COURT. Yes.

Mr. KESSLER. When they were contemplating building these boats he was engaged.

Mr. HALLE. They formed the corporation for this very purpose.

294 Q. Who is the president of the Matoil Service?

Mr. BESSON. I object, if your Honor please.

A. C. Mathiasen. That is his signature there [indicating].

Q. And, of course, this is dated July 6, 1932?

A. Yes.

Q. Were you in the employ of the Matoil Co. at the time this contract was made?

A. Yes, sir. As I said before, that is, about, corresponds with prior a week or two before July 19th, July the 6th.

Q. You were in the employ of this company at that time?

A. At that time I started.

The COURT. I will admit the contract, Mr. Besson, in evidence.

Mr. BESSON. I object to the admission of the contract in evidence. Has it been marked?

The COURT. Mark it Exhibit C–4 for identification.

(Paper marked C–4 for identification.)

Mr. BESSON. May I cross-examine the witness on this?

The COURT. Yes.

Cross-examination by Mr. BESSON:

Q. You found it necessary to refer to a piece of paper, did you not, in order to recall the date when this contract was made?

A. Well, nothing——

Q. What is that paper you have in your hand?

A. Memorandum.

Q. What is the memorandum?

295 A. Memorandum of July 19th was the first date I went to Staten Island.

Q. When did you prepare that memorandum?

A. I took it out of my files yesterday.

Q. You have no recollection independent of that?

A. I made a memorandum of the first date I went to Staten Island on the actual construction.

Q. You have no recollection independent of what you have written on that piece of paper there?

A. Yes; I have.

Q. You had to go to your files, didn't you, to find it?

A. To be exact, I did; yes.

Q. And if you hadn't gone to your files——

Mr. KESSLER. I object to that as not proper cross-examination.

The COURT. Oh, yes.

Mr. BESSON. It is, because under the——

The COURT. Just a minute.

Mr. KESSLER. This is not a general cross-examination; it is only on the question of the document. On general cross-examination I have no objection to going into it.

Mr. BESSON. The witness fixes a time when he went into the employ of this concern.

Mr. KESSLER. The time is of no importance.

Mr. BESSON. And it was on that basis of his knowing the people in the concern and their signatures——

The COURT. He is proving a contract made on July 6th, 1932, and he has fixed a time so he can identify that contract. I will permit counsel to cross-examine on that.

296 Mr. BESSON. The only question is whether he knows the signature, and then he can go into general cross-examination.

The COURT. He is cross-examining him on the validity of this particular document going into evidence. I will let him ask the question. You may have an exception.

Mr. KESSLER. I don't want an exception, your Honor.

Q. This little paper that you are rubbing there with your thumb——

A. Yes, sir.

Q. When did you write that?

A. Yesterday afternoon.

Q. You took it from an original memorandum in your files?

A. From the copy of memorandum in the files.

Q. Who prepared the memorandum that was in your files?

A. I did.

Q. At the time—at what time?

A. I made a daily report of my movements of my construction every day from the time I went to Staten Island until I finished the construction.

Q. On July 17, 1932, was it?

A. 1932.

Q. Your memorandum showed you were at Staten Island?

A. I made my first trip to Staten Island on the actual construction.

Q. That was about eleven days after what?

A. About eleven days, you might say, after the six or seventh or whatever eleven days figured, prior to that?

Q. What do you know about this contract?

297 A. I know I followed the construction from that contract. That is a——

Q. When was that given to you?

A. Given to me right after the contract was signed. I was asked to follow up the construction work.

Q. You carried that about with you when this work was going on?

A. Yes, sir.

Q. Now, you would have no recollection of that if it hadn't been for this memorandum?

A. It would be quite hard for me to remember.

Q. You had no recollection; you needed to go to the file to get the original memorandum?

A. In order that I could answer the exact date. I thought it was customary to do that.

Mr. BESSON: I ask the witness' testimony be stricken out on the ground that where a recollection is based upon a memorandum, an original memorandum not produced in court, the memorandum must be produced before the court as the original evidence. That is under the case of J. S. Warden, I think, in 123 Fed.

The COURT. I will let you get that.

Mr. BESSON. I would like to submit that case to the Court because it is important. This man says he was working there every day, he made a daily report, kept it in a file, that he has got the file and I think the ownership of this vessel is a very important thing in this controversy, I mean, and these little details I think are important to the Government. I don't mean to appear captious or technical, but if there is such a memorandum I think it ought to be produced.

Mr. KESSLER. What difference does it make what day he started to work there?

298 Mr. BESSON. It, moreover, is the rule of evidence——

Mr. KESSLER. It was just an incidental question. It has no relation of the validity of this paper.

Mr. BESSON. It is a peculiar rule in Federal procedure. I think I can get that case in just a minute.

The COURT. All right.

Mr. KESSLER. We agree with the case, but the point is not involved here.

(Mr. Besson left the room at this point.)

Mr. BESSON. If the Court please, I have not been able to locate that——

The COURT. Warden case in 123 Fed.

Mr. BESSON. There was a Warden case in 23 Fed., but I have the memorandum at home and I would like to reserve that question, I think, because there is some other proof that the Court is going to permit counsel to produce here, but there is the general proposition that has been mentioned here in Ruling Case Law about the production of memorandums for inspection by the adverse party. Now, the witness here has been relying upon an original memorandum which he keeps somewhere in his office or at home, upon which he bases his statement that he was actually present in this shipyard working on this ship pursuant to this contract.

The COURT. Yes; Mr. Besson. I don't feel that it is so material or relevant to the actual issue that it makes very much difference. He simply is trying to tell as nearly accurately as possible how long he has been with the company, and for that purpose

299 he inspected a memorandum yesterday. He knows generally how long he has been with the company, but he wanted to fix the date.

Mr. KESSLER. That date is the date he went to work on the job.

The COURT. That is right.

Mr. KESSLER. Which is of no consequence.

The COURT. I understand.

Mr. BESSON. It is a rather singular situation. Here is a case that involves three vessels that are worth obviously over $100,000. Here is a man, president of the corporation, who doesn't come here, Mr. Mathiasen. He is the man who actually signed a great many of these papers. Somebody else is sent here for the purpose. Another singular thing develops that here this very valuable piece of property is not made the subject of any public record of any kind, I mean the statute provides for it.

Mr. HALLE. There is a public record right here.

Mr. BESSON. Yes; the enrollment and license, in other words, but the enrollment and the license are no evidence of ownership. The enrollment and the license have been held by the courts to be no evidence of ownership.

You have this singular situation, and I think it should be scrutinized with the utmost care because it goes right down to the very crux of this whole case.

The COURT. All right, Mr. Besson.

This witness says he is the general manager and construction
300 manager of this company and he has in his possession a contract which he offers now. I am going to admit it over your objection; I am going to let his testimony stand and the contract be offered and marked C-4 for identification. Then when this person comes from the construction company they can undoubtedly prove the contract as well.

Mr. KESSLER. It was another vice president of the United Dock Company who signed. We are not compelled under the law to produce these people. They are in Long Island under no control by us.

The COURT. Just a minute.

Mr. KESSLER. Apparently they are a world-known company, the United Dry Dock is known to Mr. O'Keefe, known to everybody who knows anything about the shipbuilding. It is a very large concern. Why should we be compelled just because the prosecutor is captious about it——

Mr. BESSON. I am not captious. For instance, this contract, while it is not in evidence, there is no jury here, but this contract says a bill of sale for the barges will be delivered to you contemporaneously with the deposit of the final $15,000 as stated. This whole transaction, I think, under the circumstances, deserves careful scrutiny.

The COURT. All right. He is going to offer the contracts and I am going to allow the contract to be offered for identification at this time.

Mr. BESSON. Yes, sir.

(Paper marked C-4 for identification.)

By Mr. KESSLER:

Q. You know Mr. Hallock's signature, do you?

A. Yes.

Q. Is that his signature?

301 Mr. BESSON: I object to that. I ask leave to cross-examine the witness as to the man's knowledge of the handwriting of Mr. Hallock.

The COURT. All right.

Cross-examination by Mr. BESSON:

Q. Do you know Mr. Hallock personally?

A. Yes, I do.

Q. How long have you known him?

A. About, I know him to speak to for quite a number of years, but I know him rather better since he has made this contract with the Matoil Service.

Q. Where did you see him write?

A. I have had correspondence, I believe I have saw, through the mails and on the desks.

Q. How many times?

A. Maybe two or three times.

Q. You mean you have seen him write his name?

A. I didn't say I seen him write his name.

Q. You never saw him write his name at all?

A. No.

By Mr. KESSLER:

Q. Did you see him sign this contract?

A. I have seen correspondence——

By the COURT:

Q. I will let him answer this question.

A. No; I was not present when that was signed, only to see his signature for comparison.

Mr. BESSON. He never saw him sign his name at all, so he might have gotten a signature by someone else.

Mr. BESSON. I think these things are all susceptible of proof.

302 The COURT: No question about it.

By Mr. KESSLER:

Q. Do you know Mr. Mathiasen's signature?

A. Yes.

Q. Is that his signature [indicating]?

A. Yes.

The COURT. Want to cross-examine him on Mr. Mathiasen's signature?

Mr. BESSON. Yes.

Cross-examination by Mr. BESSON:

Q. When did you see Mr. Mathiasen sign his name?

A. I have seen Mr. Mathiasen sign his name different times.

Q. How many times, about?

A. Oh, better than ten.

Q. Is Mathiasen around anywhere now?
A. Why, I believe he is.
Q. Do you know where?
A. Why, yes.
Mr. KESSLER. That is no proper cross-examination on this offer.
The COURT. All right. The other contract is similar, is it?
Mr. KESSLER. Exactly.
The COURT. All right.
Mr. KESSLER. I offer, without repeating the same questions, I offer this second paper, which is the contract for what boat?
The WITNESS. That is the motor boat.
Mr. BESSON. Objected to. The paper speaks for itself.
303 Mr. KESSLER. He can identify it for the record.
(Paper marked C–5 for identification.)
Mr. KESSLER. Does your Honor still insist these are only for identification?
The COURT. Yes.
Mr. KESSLER. I should like to offer these two bonds that bear the signature of Mr. Hallock.
Mr. BESSON. I object.
The COURT. He offers them for identification.
Mr. BESSON. Identification only.
The COURT. All right.
(Paper marked C–6 and C–7 for identification.)

By Mr. KESSLER:
Q. Under these contracts you say they were delivered to you a day or two after they were executed?
A. Yes.
Q. And then you say on the 19th day of July of 1932 you went there for the first time and supervised the construction?
A. Yes, sir.
Q. Did you supervise these three boats as they were constructed?
A. Yes, sir.
Q. Were they constructed in accordance with this contract?
A. Yes, sir.
Q. Were they delivered to your company?
A. Yes, sir.
Q. After they were completed?
A. Yes, sir.
Mr. KESSLER. May I now renew the offer of these contracts?
304 Mr. BESSON. Objected to.
Mr. KESSLER. In view of the testimony of this witness.
Mr. BESSON. Objected to.
Mr. KESSLER. Your Honor will allow me an exception?
The COURT. All right.
(Claimants' counsel prays an exception which is hereby allowed and sealed accordingly.) (Sealed.)

Q. Was any one of these three boats over sixty feet long?
A. Any one over sixty feet?
Q. Yes.
A. Two of them are, three of them are.
Q. The length is shown in the contract, is it not?
A. Yes.
Mr. BESSON. Objected to.
Q. Any of them over sixty-five feet?
A. Two of them.
Mr. BESSON. That is objected to, if your Honor please.
The COURT. Why?
Mr. BESSON. Referring to the contract. I think the registry that has been offered in evidence shows the length of the vessels.
The COURT. He is the representative of the owner of the boat. He certainly can tell.
The WITNESS. That would correspond to the contract.
Mr. BESSON. I object to his reference to the contract.
The COURT. He is not referring to the contract. He said, "How long are the boats?"
305 Mr. BESSON. Then he adds the statement on the record, that is referring to the contract, I think; wasn't that the expression?
The COURT. He said he led him by asking him if the boats were over sixty feet long. I suggest he make the question not a leading question and ask him how long the boats are if he wants to.
Q. Give me the lengths.
A. Two boats are 109 feet long and one is sixty-four feet eight.
Q. Which one is sixty-four feet?
A. The "Evelyn."
Q. Is that the motorboat?
A. Yes.
Q. Sixty-four feet?
A. Yes.
Q. I show you a paper and ask you if you know what that paper is [indicating]?
The COURT. Can you identify that paper?
The WITNESS. Yes; that is a contract for the charter of the boats.
Q. It is of one boat, is it not?
A. This is the "Doris."
Q. Do you know——
Mr. BESSON. I object to that, if the Court please; it is not the proper method of proving this document. There is a witness in each case and the document will speak for itself.
Mr. KESSLER. It certainly does.
Mr. BESSON. The witness has no right to give his views as to what the legal effect of this document is.
The COURT. That is right.
306 Mr. KESSLER. I asked if he knows the signature.
Mr. BESSON. The witness tells us it is a contract.

The COURT. The proper question is: can you, Mr. Witness, identify this paper? and he says yes. How can you identify the paper?

The WITNESS. How can I identify the paper; is that the question?

The COURT. Yes.

The WITNESS. I drew the agreement.

Mr. KESSLER. "I drew it", that is the answer, I suppose.

The COURT. Yes.

Q. Do you know by whom it is signed?

Mr. BESSON. I object to that as being not the proper method of proving the document.

The COURT. Were you present when the paper was signed?

The WITNESS. No, sir.

Q. Do you know the signature, the first signature?

A. I know C. Mathiasen's signature.

Mr. BESSON. I object as incompetent, irrelevant, and immaterial.

The COURT. Well, now, Mr. Kessler, you have a paper there that this man drew, it is true, but the paper is signed, executed by two different parties, and witnessed by a subscribing witness.

Mr. KESSLER. Of one party.

The COURT. Yes.

307 Mr. KESSLER. But not of the other. I am proving the other signature. I am proving Mathiasen's signature which is not witnessed.

The COURT. Why shouldn't Mathiasen be here?

Mr. KESSLER. If your Honor insists on it, that is one thing, but legally we have a right to prove by anybody who knows his signature. If your Honor insists——

The COURT. I don't think so.

Mr. KESSLER. That is the law.

Mr. BESSON. It is not the law.

Mr. KESSLER. I am not going to cite you a case because I don't know one, but I am sure I will find a case.

Mr. HALLE. It is elementary.

The COURT. It is not so elementary. You see, Mr. Besson's zealousness here is not to be criticized because this is the very pith of the controversy at the present time, the proper ownership of this vessel or of these vessels. Now, here is a paper to be proven. There is a regular set legal way of proving that paper.

Mr. KESSLER. I respectfully submit when here is a single signature on the paper even with a subscribing witness——

The COURT. How do we know the subscribing witness is only to the other signature?

Mr. KESSLER. All you have to do is look at the paper.

Mr. BESSON. It is not in evidence.

Mr. KESSLER. The Court can look at it and see whether there is a subscribing witness.

308 Mr. BESSON. I think the subscribing witness can be produced, if there is one, and testify. We don't even know who he is.

Mr. KESSLER. That is all we have got to say; we don't know the witness, and that certainly meets the situation.

The COURT. It seems to me, Mr. Kessler, it is certainly incumbent upon you to explain away the absence of the person who signed this before you can attempt to prove it by somebody else who drew the document who was not present at its execution.

Q. Do you know who the subscribing witness is?

A. No.

Q. Never heard of him?

A. No, sir.

Q. You don't know who he is?

A. No.

Mr. KESSLER. I think that is all we can do, is to tell you we don't know the subscribing witness.

The COURT. I am speaking of Mathiasen, the president of the company.

Mr. KESSLER. What about it? Does your Honor mean there is no subscribing witness——

Mr. BESSON. If your Honor please, this man was not present at the time of the execution of the document, it is evident that there was a man known to counsel, a man named Mathiasen, who actually signed the document who was present there. Even assuming the subscribing witness is a fictitious party or this man George Rogers is a fiction.

Mr. KESSLER. I don't say anything about his being fictitious. He is not known to us.

309 Mr. BESSON. But the fact of the matter is, why, this man Mathiasen at least can be produced here. Here is a man not present at the signing of this paper who simply because he knows the handwriting of one of the parties concerned is endeavoring to testify. I don't see how his testimony can in any way be the basis for the admission of the document in evidence.

Mr. HALLE. It is the only way that that is proven every day in the court.

Mr. BESSON. I have been practicing law twenty-five years——

The COURT. Just a minute. Go ahead.

Mr. HALLE. If a man knows another person's signature he can testify that is his signature. You don't have to bring the other individual into court.

The COURT. No; that is true, Mr. Halle, because it is generally accepted, where it is not a heatedly contested point, that happens very often, but it seems to me that it is necessary to account for the absence of the man who actually signed. The best proof, certainly the best evidence on that signature, is the man who made the signature. That will have to be conceded. Now, it is true if that person disappears or is not available in the jurisdiction secondary evidence may be offered to prove that signature.

Mr. KESSLER. May I suggest this is not secondary evidence. The law recognizes no distinction between a man that says, "That is my signature", and somebody else who does.

The COURT. I can't agree with that.

Mr. KESSLER. I just sent out for the law. I don't want to delay.

310 Will your Honor take it subject to—mark it for identification?

The COURT. Yes.

Mr. KESSLER. To identify the signature if he knows the signature.

The COURT. Yes.

Q. Do you know——

The COURT. I will admit the testimony that he drew the paper.

Q. Do you know that signature there [indicating]?

A. Yes.

Q. Whose signature is that?

A. C. Mathiasen.

Q. Who is Mr. Mathiasen?

A. He is the president of the Matoil Service and Transport.

Mr. KESSLER. I offer the paper.

Mr. BESSON. Objected to.

The COURT. All right. I shan't admit the paper in evidence at this time.

Mr. KESSLER. Mark it for identification.

(Paper marked "C–8" for identification.)

Q. I show you another paper and ask you if you know what that paper is; yes or no?

Mr. BESSON. Objected to.

A. Yes.

Q. Do you know who drew it?

A. Yes.

Q. Who drew it?

A. I did.

Q. Do you recognize the signature on that paper?

A. Yes, sir.

Q. Whose signature is it?

311 A. C. Mathiasen.

Q. The same gentleman who signed the paper shown you a minute ago?

A. Yes.

Mr. KESSLER. I offer that paper.

Mr. BESSON. I would like to cross-examine.

Cross-examination by Mr. BESSON:

Q. Were you prescent when Mr. Mathiasen signed him name?

A. No, sir.

Mr. BESSON. Objected to on the ground it is not proved.

Direct examination by Mr. KESSLER:

Q. Do you know his signature?

A. Yes.

Q. Is that his signature?

A. Yes.

The COURT. Mr. Mathiasen is the president of this company, is he not?

The WITNESS. Yes.

The COURT. Still is?

The WITNESS. Yes.

Mr. KESSLER. We offer it in evidence.

The COURT. I shan't allow it.

Mr. KESSLER. I ask it be marked for identification.

(Paper marked C–9 for identification.)

Q. I show you another paper and ask you whether you know what that paper is?

312 A. Yes, sir.

Q. Do you know who drew it?

A. Yes, sir.

Q. Who drew it?

A. I did.

Q. Do you recognize the signature under the name Matoil Service and Transport Company?

A. Yes, sir.

Q. Whose signature is that?

A. C. Mathiasen.

Q. The same as in the other paper?

A. Yes, sir.

Q. You are familiar with that signature?

A. Yes, sir.

Mr. KESSLER. I offer that paper.

Mr. BESSON. Objected to. I would like to cross-examine the witness.

Cross-examination by Mr. BESSON:

Q. Directing your attention to this document to which the last questions have referred, were you present at the time of the signing by C. Mathiasen?

A. No, sir.

Mr. BESSON. Objected to.

The COURT. All right.

Mr. KESSLER. Your Honor refuses it?

The COURT. Yes.

Mr. KESSLER. I ask it be marked for identification.

(Paper marked C–10 for identification.)

Mr. KESSLER. I have no further questions.

The COURT. All right.

313 Mr. HALLE. I just want to ask the witness a question while he is on the stand.

The COURT. Now, what is this, direct examination? You don't represent these people, Mr. Halle.

Mr. HALLE. No; I don't, but I am here on behalf of the claimant of the cargo. Mr. Weinberger is absent.

The COURT. This is cross-examination now?

Mr. HALLE. Yes. I am acting for Mr. Weinberger in his absence.

The COURT. Let me see. It seems to me that the Government is entitled to cross-examine first.

Mr. HALLE. Pardon me. I thought they were through.

Mr. BESSON. No.

Mr. HALLE. Pardon me.

The COURT. He has not even begun yet.

Mr. HALLE. My error.

The COURT. All right.

Cross-examination by Mr. BESSON.

Q. Where do you live?

A. In Brooklyn.

Q. What address; give the precise address?

A. 536 72d Street.

Q. Is that an apartment house?

A. It is a one-family house into living rooms.

Q. You are a roomer in this house?

A. Yes, sir.

Q. Are you still employed by the Matoil Transport Company?

314 A. Yes, sir.

The COURT. Matoil Service and Transport Company, Inc.

Q. And where is the office of the company?

A. 15 Moore Street.

The COURT. How do you spell that?

The WITNESS. M-o-o-r-e.

The COURT. Where is that?

The WITNESS. New York City.

Q. New York City is a big place. Tell us just the address.

A. It is down near South Ferry, on the lower end of New York.

Q. Can't you give us the precise address?

The COURT. He did, 15 Moore Street, Mr. Besson.

Is that an office building?

The WITNESS. Yes, sir.

Q. Who is the landlord of the house where you are living?

A. Why, Elder.

Q. Who?

A. E-l-d-e-r.

Q. How long have you lived there?

A. About a month and a half.

Q. Where did you live before that?
A. Astoria, Long Island.
Q. You have no family living with you at the present time, have you?
A. Yes; wife and two children.
Q. How long did you live in Astoria?
A. About 8 months.
Q. How long have you been employed by the Matoil Transport and Service Company, Service and Transport Company?
315 A. Shortly after the first of July.
Q. 1931?
A. 1932.
Q. What was——
The COURT. 1932.
Q. What was your salary?
A. Fifty dollars a week.
Q. Had you had any previous experience in ship construction?
A. Yes, sir.
Q. Are you a graduate of any institution?
A. My father's shipyard.
Q. Where was your father's shipyard?
A. New Brunswick, N. J.
Q. Where?
A. New Brunswick, N. J.
Q. How many years have you been employed there?
A. I grew up as a boy in and about my father's shipyard and I had charge of the construction, and so forth, and observation and men.
Q. Did you leave your father's shipyard to go to the, to be employed by the Matoil Company?
A. No, sir. I went with my brother in the shipping business.
Q. How long had you been so employed?
A. About twenty years.
Q. What official of the corporation, if it was a corporation, employed you?
A. Of the Matoil Service?
Q. Yes.
A. That is the question? Captain Mathiasen.
Q. Where did you meet him?
A. Where did I find him?
Q. Yes.
A. I knew him for some few years before that.
316 Q. Where did you first meet him?
A. I first met him in and about the office building at 15 Moore Street.
Q. How many years ago?
A. I would say seven years ago.
Q. Will you describe Captain Mathiasen?

A. Why, yes; you mean physically?
Q. Yes.
A. Tall man, sort of light grayish hair, going into gray hair.
Q. What stature would he be, five feet eight, five feet ten?
A. I would say about five feet eleven.
Q. Gray hair?
A. Going into gray hair, between gray and brown.
Q. About how old a man?
A. I should judge about forty-four, forty-five.
Q. And the color of eyes?
A. Sir?
Q. What color of eyes?
A. Well, I couldn't say that.
Q. You have seen him a whole lot, haven't you?
A. Yes.
Q. Is he a dark-eyed man or light-eyed?
A. I don't remember the color of his eyes.
Q. Do you see him very often?
A. Yes, sir.
Q. Daily?
A. Most every day.
Q. Who paid you for your services?
A. Captain Mathiasen.
Q. He ran this company?
A. Yes, sir.
Q. Now, what sort of an office did the company have?
A. What sort of an office?
317 Q. Yes.
A. Very large office.
Q. How many rooms?
A. Five.
Q. Many clerks there?
A. Yes.
Q. How many?
A. Two, three, three.
Q. Can you give their names?
A. Yes.
Q. Do so.
A. Fred Oleson, Margaret Wetherill, Louise Locke.
Q. Louise Locke. Who else?
A. Margaret Wetherill, Fred E. Oleson.
Q. What are the duties of these three persons?
Mr. KESSLER. I submit this is not proper cross-examination.
Mr. BESSON. This man is coming as an official of a company.
Mr KESSLER. There are some limitations.
Mr. BESSON. The limitation of cross-examination lies within the Court's sound discretion. I don't want to take up the time of the Court, but here is a company——

The COURT. I am letting you cross-examine him, Mr. Besson.

Mr. BESSON. Yes.

Q. (Question read).

A. Louise Locke is the telephone operator. Margaret Wetherill is the bookkeeper, Fred Oleson is the despatcher of the two boats.

Q. Do you know who the directors of this corporation are, if it is a corporation?

318 A. Pardon me. They are for the Mathiasen Towing Line, the despatcher, the bookkeeper, and the telephone operator.

Q. Of the Mathiasen Towing Line?

A. Of the Mathiasen Towing Line.

Q. What about this Matoil Service and Transport Company?

A. Well, C. Mathiasen is the president and, what else do you want to know?

Q. Who are the board of directors, if you know?

A. I don't know.

Q. Do you know?

A. No, sir.

Q. You are a vice president of this corporation, aren't you?

A. Yes.

Q. Didn't you ever attend a directors' meeting?

A. No. I was in charge of the construction all the time. I was busy following that up.

Q. And so that during all the time of your performance of your official duties you have never had occasion to discover who the board of directors of Matoil Service and Transport Company, Inc., are?

A. No.

Q. And you never took the trouble to find it out, did you?

A. No, sir.

Q. Where are the papers, the documents of this corporation kept?

A. Captain Mathiasen has charge of that. He keeps them.

Q. Does he keep them in this office that you have mentioned?

A. I don't know.

Q. You don't know where he keeps them?

A. No.

319 Q. What other employees are there of this Matoil Service and Transport Company, Inc., beside yourself?

A. Why, to my best recollection, Margaret Wetherill is the bookkeeper and secretary and treasurer.

Q. Of the company?

A. Of the company.

Q. Of that company as well as the Mathiasen Towing Company?

A. Yes, sir.

Q. What are the other persons?

A. That is all I know of.

Q. She is the only person?

A. Yes.

Q. What business does this concern transact?
A. I don't know.
Q. You are vice-president of it?
A. I know that. All I know is that the barges was built for to carry oil, to transport oil.
Q. That is your supposition?
A. That is my supposition.
Q. They could have transported any other liquid, couldn't they?
A. Why, just what do you mean?
Q. They could transport any other liquid cargo beside oil?
A. They are built to transport liquid.
Q. Any kind of a liquid?
A. Liquid material, in bulk.
Q. It could be gasoline or oil?
A. It could be gasoline or oil.
Q. Molasses?
A. Anything.
Q. Milk, if that could be preserved. You were not concerned in any way with the operation of these boats, were you?
320 A. No, sir.
Q. When was the construction of the boats completed?
A. September the 21st.
Q. Of 1932?
A. 1932.
Q. Since that time you have been drawing a salary of $50 a week?
A. No, sir.
Q. You are still vice president, you are still connected?
A. Still vice president as far as construction is concerned, but since that time I have been drawing a salary from the Mathiasen Towing Line. I have been looking out for the——
Q. You are also an official of the Mathiasen Towing Line?
A. I am manager of the Mathiasen Towing Line.
Q. You have a dual capacity?
A. And I have——
Q. How many vessels are owned by the Mathiasen Towing Line, if you know?
A. Which type, any type vessels?
Q. Any type vessel?
A. Why, there is four tugboats I know of and three covered barges.
Q. You have charge, you are manager of them in what respect?
A. Looking out for the repairs.
Q. Do they have any shipyard or place where they are laid up particularly for repairs?
A. They go to various shipyards wherever may be appropriate to send them.
Q. You represent the interests of the Towing Company?
A. Yes, sir. I go there and look out for the repairs, see that it is properly done.

321 Q. You receive a salary of how much for that?

A. At the present time I am receiving a salary of $25 a week.

Q. Now, when you were receiving $50 a week from the Matoil Service and Transport Company were you also being paid by the Towing Company?

A. No, sir.

Q. And you ceased to be paid by the Matoil Service and Transport Company in September of 1932, and from that time on you were employed by this other company?

A. Yes, sir.

Q. The Mathiasen Company. Then you have been going to business every day, haven't you?

A. I have been trying to do business.

Q. You have been going to your office?

A. Yes; I have been going to the office.

Q. And you are being paid?

A. Looking out——

Q. You see Mathiasen there every day, don't you?

A. Most every day that he is there.

Q. When was the last time you saw Mathiasen?

A. I saw him today.

Q. This morning before you left the office?

A. Yes, no; you mean when is the last time I saw him?

Q. Yes.

A. I saw him this morning in Trenton.

Q. Is he here in the court room?

A. What?

Q. Is he here in the court room?

A. No.

Q. Where did you see him in Trenton?

A. I came over with him in his car.

Q. I see.

Mr. KESSLER. He will be here. Don't worry about that.

322 Q. When you left him, where was he?

A. I left him in the hotel.

Q. The Matoil Service and Transport Company owned no other vessel, did it?

A. No, sir.

Q. You knew nothing as to the use being made of these vessels after September 1932, did you?

A. No, sir.

Q. Did you know George Rogers?

A. No, sir.

Q. Did you ever see Rogers around anywhere to your knowledge?

A. Don't know him. Never saw him.

Q. Did you have any experience in drawing legal papers with respect to the operations of vessels and boats of different kinds?

A. Only in respect to making charter parties and contracts.

Q. You had a considerable experience in drawing charter parties?

A. Yes.

Q. You spoke this morning about getting a memorandum. Where did you keep those memorandums?

A. In a folio in my desk.

Q. In the office?

A. Yes; in the desk, in the file.

Q. Of the Mathiasen Towing Company?

A. Yes.

Q. You had been employed by the Mathiasen Towing Company some time before you went to work on the construction of the Matoil Company, hadn't you?

A. About two weeks, no——.

Q. You worked two weeks for the towing company and then went into the employ of the Matoil Service and Transport Company?

A. No; I will explain that to you in order to enlighten you on it.

323 Q. All right.

A. About in April Captain Mathiasen and myself formed a corporation called the Mathug Marine Towing Company, that is taken from the first three letters in Captain Mathiasen's name and the first three letters in my name, coined by myself, the word was. We started that corporation to function to operate in his office, space reserved in his office. After that was going along we started it up trying to do some business, which was quite difficult to do. Captain Mathiasen came to me and told me he was going to build some barges and asked me if I would look out for the construction of the barges. That was along in about April. So, long in about the first of May he told me he would, first of July, that was in May around the latter part of April, May, or the first part of July, he told me he would make me a vice president and general manager in charge of construction, and asked me if I would look out for and follow up the construction of those barges, which I says I would.

Then when the materials was ready for assembly at the plant of the United Dry Dock Company at Arlington I started to go there on daily trips in order to supervise the construction of the barges. I followed them up closely, going there most every day that weather permitted, outside of Sundays, until the last construction was completed, on the 21st of September. Then I ceased to be active in the Matoil Service and Transport Company and only further on the point of new construction, which was talked of intending to build, of which so far no new construction has been built.

Then, as I explained before, I went over in the capacity of the Mathiasen Towing Line as manager in order to look out for the tow boats, and so forth, and I followed various repairs on

324 boats up at different dry docks and all at the same time continuing to try and put the Mathug Marine Company, to make

some money for the Mathug Marine Company, and in the marine business it has been a very difficult thing to do.

Q. Well, you had no concern, however, with the incorporation of the Matoil Service and Transport Company, did you?

A. No concern.

Q. I mean you were not one of the incorporators or——

A. No. As I explained to you, I just told you I was made vice president and general manager in charge of construction.

Q. Yes. But you accepted that title and made no investigation whatever to discover who the officials of the company other than the president, Captain Mathiasen, you didn't know who the board of directors were?

A. No, sir.

Q. You never attended any meetings of them?

A. No, sir.

Q. Never examined the bylaws of the corporation, if there were any?

A. No.

Q. In fact, you don't really know whether there was a corporation at all, do you?

A. Only from what Captain Mathiasen told me.

Mr. BESSON. That is all.

Re-direct examination by Mr. KESSLER:

Q. Mr. Hughes, what is the business of this Mathiasen Company that you say you formed in April?

A. The Mathug Marine?

Q. Yes.

A. Buying and selling and effecting charters.

Q. Brokerage business, is it not?

325 A. It is more of a question of buying and selling of vessels and barges and arranging freight rates, and so forth—transportation of various mateials.

Q. These memoranda the prosecutor has been inquiring about, what do they consist of; what is on them?

A. The memorandum I spoke of?

Q. Yes.

A. It is a memorandum of the daily construction work that took place on the boats from the time I went there until they was constructed, showing the progress made in construction.

Q. Do you know why Captain Mathiasen is at the hotel now and not here?

A. Yes; he doesn't feel well.

Mr. BESSON. I object to the reason why he is at the hotel.

The WITNESS. I can answer that question.

Mr. BESSON. In fact, I don't know how the witness can know he is at the hotel.

Mr. KESSLER. He came with him.

Mr. BESSON. That is the last place that he saw him, at the hotel. He doesn't know where he is now.

Mr. KESSLER. You don't have to get excited about it. There is no jury here to impress. The only reason Mr. Mathiasen is not here is because he doesn't feel well. He is over at the hotel. He will probably feel better. I didn't want any mystery about it.

The COURT. All right. Your statement of that will be taken as a fact.

Mr. KESSLER. I only repeat it because the witness told me he was sick.

The COURT. All right.

326 Mr. HALLE. I just want to ask one or two questions.

Cross-examination by Mr. HALLE:

Q. Mr. Hughes, are these three papers duplicates of the three papers which are marked for identification C–8, 9, and 10 for identification [indicating]?

A. That is a duplicate.

The COURT. They would speak for themselves, wouldn't they, Mr. Halle?

Mr. HALLE. Yes.

The COURT. He can only testify as to the——

Mr. HALLE. Very well. I will just ask him this question.

Q. Are the signatures on these three papers that I show you the signatures of C. Mathiasen [indicating]?

Mr. BESSON. I object to that. There are a number of signatures there.

Q. I am referring to the green signatures here.

Mr. BESSON. I ask that the papers be denominated.

Mr. HALLE. I don't want to call them anything. You would object to my characterizing them.

Mr. BESSON. They have been marked for identification.

Mr. HALLE. I am talking about three others.

Mr. BESSON. I object to your referring to them at all unless they are identified in some way.

Mr. HALLE. All right.

327 Q. Are these three papers I show you now duplicates of the three papers respectively that are marked Exhibits for identification C–8, 9, and 10 [indicating]?

A. Yes, sir.

Mr. BESSON. Objected to as being a general question and calling for a conclusion.

The COURT. Yes; I don't see that that is evidence. Are these duplicates of the papers? They will speak for themselves.

Mr. HALLE. My friend forced me to ask that question. I don't want to ask it. I only want to identify a signature on these three papers by this man here, of a paper that I hope later to put in evidence.

Mr. BESSON. There is a method of doing it and this is not the method.

The COURT. All right; call these exhibits R–1, 2, and 3 for identification.

(Paper marked R–1, R–2, and R–3 for identification.)

The COURT. Now, you want to ask him whether he can identify those papers in any way.

Q. Can you identify these three papers [indicating]?

A. Yes, sir.

Q. What are they?

The COURT. No; not what are they; how do you identify them?

Q. How do you identify them?

A. I drew them. I worded them.

Q. Is the typewriting on these three papers, the duplicates of exhibits for identification C–8, 9, and 10?

A. May I look at them, your Honor?

328 The COURT. Yes.

A. Yes, sir.

Mr. BESSON. I object to that, if the Court please. It could not be unless all were prepared at one time.

The WITNESS. I wrote them on the typewriter.

Mr. BESSON. All six documents at one time, at one writing?

Mr. HALLE. He did it one after the other.

The COURT. Just let him say how he did it.

A. There was—is that a carbon—this is the original—these are carbons [indicating].

Mr. BESSON. The witness indicates C–9 for identification as the original.

Mr. HALLE. All right. This refers to the "Evelyn."

Q. Hold that paper in your hand. Now, I show you this paper here which by direction of the Court was marked R–1 for identification. Is R–1 for identification a duplicate or carbon?

A. Carbon copy of this one here [indicating].

Q. Very well. Now, the signature in green ink, "C. Mathiasen" is that the same, was that written by the same individual as the signature "C. Mathiasen" written on exhibit for identification C–9?

Mr. BESSON. Objected to, in the first place, the witness is not qualified as a handwriting expert.

Mr. HALLE. We don't need qualifications of handwriting experts. Anybody can qualify as a handwriting expert.

Mr. BESSON. The witness has not testified he was present

329 when either of these papers was signed; and I don't think there is proper testimony before the Court.

The COURT. He has already testified to that effect. You are asking whether it is a duplicate.

Mr. HALLE. Yes.

Mr. BESSON. He is asking whether the same man signed this paper as signed the other.

Mr. HALLE. What else am I doing? I am asking him.
Mr. BESSON. I object to it.
The COURT. You can ask him whether he recognizes the signature.
Q. Do you recognize the signature on R–1 for identification?
A. I recognize that to be C. Mathiasen's signature.
Q. You know Mr. Mathiasen's signature?
A. Yes, sir.
Q. As you have testified. Now, referring to R–2 for identification, is that a duplicate of——
A. That is the original.
Q. The original, and C–8 for identification is the carbon copy?
A. Is the carbon copy.
Q. The signature you have identified, the signature on C–8 for identification, now will you look, I am referring to Mr. Mathiasen's signature?
A. Yes.
Q. I am referring now to the signature of R–2 for identification. Was that written by the same man?
A. I identified Mr.—Captain C. Mathiasen signature, that to be C. Mathiasen's signature.
Q. Very well. Now, we will go to looking at R–3 for identification and comparing it with C–10 for identification.
330 A. R–3 is the original.
Q. And C–10?
A. The carbon copy.
Q. The carbon copy. You have identified the signature of C. Mathiasen on C–10 for identification. The signature appearing on R–3 for identification in green ink, do you identify that signature?
A. Identify that as C. Mathiasen's signature.
Q. Written by the same person?
Mr. BESSON. I object to that part of it.
A. Yes.
Mr. BESSON. I ask that be stricken out.
The COURT. It doesn't make any difference.
Mr. HALLE. That is my only purpose for the present.
The COURT. Yes. All right.
Mr. HALLE. That is all.

By the COURT:
Q. Oh, Mr. Hughes.
A. Yes, sir.
Q. Isn't it possible that the Matoil Service and Transport Company, Inc., may have conveyed these three vessels away on, say, December 1, 1932, without your knowledge?
A. I had no knowledge of the operation after September 21.
Q. So it is entirely possible that that might have happened?
Mr. KESSLER. I don't want to object to your Honor's question but there cannot be any such legal inference by the Court. Once there is a proof of ownership there is a presumption.

The COURT. The ownership has got to be proven as on or about December 20, 1932.

331 Mr. KESSLER. I don't disagree with that.

The COURT. As I understand it, he says his connection with this particular company terminated on or about September 1932.

Mr. KESSLER. Your Honor, once there is a proof of ownership, assuming it is proven, the presumption is all the way through until the contrary is proven. I don't think we need argue that. We are going to produce Mr. Mathiasen if he is well.

The COURT. All right.

Mr. KESSLER. Are you through?

The COURT. I would like an answer to the question.

(Question and answer read as follows):

"Q. Isn't it possible that the Matoil Service and Transport Company, Inc., may have conveyed these three vessels away on, say, December 1, 1932, without your knowledge?—A. I had no knowledge of the operation after September 21.

"Q. So it is entirely possible that that might have happened?"

Mr. KESSLER. We object to that and ask an exception.

The COURT. Strike that other question out.

Mr. KESSLER. Will your Honor note it as timely.

The COURT. Yes.

(Claimant's counsel prays an exception, which is hereby allowed and sealed accordingly.) (Sealed.)

By Mr. KESSLER:

Q. These two boats, which are testified are over sixty-five feet long, they are not self-propelling, are they?

332 A. No, sir.

Q. The only self-propelling boat is the one under sixty-five?

A. Yes, sir.

Mr. KESSLER. I intended to conclude with this witness, but apparently it becomes important that we must have Mr. Mathiasen.

The COURT. All right.

(A recess was here taken until 1:45 P. M.)

CONRAD MATHIASEN, called on behalf of the claimants, being duly sworn, testified as follows:

Direct examination by Mr. KESSLER:

Q. Captain Mathiasen, what is your business?

A. Transportation.

Q. Are you connected with the Matoil Supply and Transportation Company?

A. Yes, sir.

Q. Can you tell us who are the owners of the boats "Helen", "Doris", and "Evelyn"?

A. Owned by the Matoil Service and Transport Company.

Mr. BESSON. I object to that.

Mr. KESSLER. Best evidence in the world.

The COURT. Well——

Mr. BESSON. It is a conclusion by the witness.

Mr. KESSLER. Only way we can prove it. It is a fact, not a conclusion.

Mr. BESSON. In the first place, if the Court please, there is no evidence yet before the Court that there is a corporation.

333 The COURT. That is what I am going to ask him.

Mr. BESSON. They have not produced the certificate of incorporation.

The COURT. Well, we will let the Captain say what his office is in the corporation preliminarily.

Q. What is the Matoil Service and Transport Company, what is it?

The COURT. Incorporated?

A. Incorporated.

Q. Of what State?

A. Delaware corporation.

Q. Did you have it incorporated?

A. Yes, sir.

Mr. BESSON. I object to that, if the Court please. That is not the best evidence of the incorporation. The certificate could be produced.

The COURT. What office do you hold in that corporation?

The WITNESS. President.

Q. Who are the other directors of the company?

A. Fred E. Oleson and Marjorie Wettrell.

Q. How do you spell her last name?

A. W-e-t-t-r-e-l-l.

Q. And you are the president of it, are you?

A. Yes, sir.

Q. And have been president since when?

A. Since the organization of the company.

Q. I see. Now, I show you, Captain Mathiasen, a contract which is marked C–4 for identification, and ask you whether or not that is a contract entered into by your company with the United Dry Docks, Inc.?

334 Mr. BESSON. Objected to on the ground that the document speaks for itself, if it is before the Court.

The COURT. Well, he can ask him whether he executed that contract.

Mr. BESSON. I mean the form of the question by counsel presupposes the witness's opinion as to what this document is.

Mr. KESSLER. Just because I call it contract, you mean?

Mr. BESSON. If counsel calls the attention of the witness to a document identifying it and asking him if that is his signature and stating the circumstances——

Q. I show you a document, not a contract, and ask you whether you executed that document [indicating]?

Mr. BESSON. What document is it?

Mr. KESSLER. C–4 for identification.

Q. I ask you whether you executed that contract?
A. Yes, sir.
The COURT. Document.
Q. In behalf of the Matoil?
The COURT. You insisted on calling it a contract.
Mr. KESSLER. I am sorry.
Q. I meant to say document, on behalf of the Matoil Service and Transport Company?
A. Yes, sir.
Q. And does your signature appear upon that document?
A. Yes.
Q. Indicate it, indicate your signature?
A. Yes, sir.
335 Q. Where is it?
A. [Indicating.]
Q. All right, sir. Do you know Mr. Hallock?
A. Yes, sir.
Q. Were you present when this document was executed?
A. Yes, sir.
Q. Did you see him sign it?
A. Yes, sir.
Q. I point to what appears to be his signature and ask you whether that is in fact his signature [indicating]?
A. Yes, sir.
Q. Did you see him sign it?
A. Yes, sir.
Mr. KESSLER. I offer the document in evidence, which upon inspection will be a contract.
Mr. BESSON. No objection.
The COURT. All right.
(C–4 for identification received in evidence.)
Q. I show you another document marked C–5 for identification and ask you to examine that paper and ask you if you executed that contract, th[illegible] document, on behalf of the Matoil Service and Transport Comp[illegible]ay [indicating]?
A. Yes, sir.
Q. Is that your signature?
A. Yes, sir.
Q. Did you see Mr. Hallock sign that document?
A. Yes, sir.
Q. And is that his signature?
A. Yes, sir.
Mr. KESSLER. I now offer the papers.
336 Cross-examination, by Mr. BESSON:
Q. This letter which appears to be a part of this document is also signed C. S. Hallock?
A. Yes.

Q. Do you know, why is that annexed to the, as a part of C–5 for identification?

A. This is only a reference to our previous contract in which they installed a Lister-Diesel engine, and this is a supplementary letter added on to a contract that I would not approve of the Lister-Diesel engine as in the contract and to have a Fairbanks-Morse, which you will find——

Q. In other words, it was a change?

A. From the Lister engine to the Fairbanks-Morse. It is just a matter in the change of the type of an engine.

Q. Where was this executed?

A. At the office of the United Dry Dock.

Q. What authority did you have to execute it?

A. What authority?

Q. Yes.

Mr. KESSLER. I object to that.

The COURT. Let him answer.

Mr. BESSON There is no presumption a president of a corporation can execute

Mr. KESSLER. Nobody can complain but the corporation. You cannot complain.

Mr. BESSON. I think we have a right to interest ourselves in it.

The COURT. Yes. I will let you ask it.

Q. How many shares of stock do you own in this corporation?

337 Mr. KESSLER. I object to that. You are not on cross-examination yet. Let me finish with the witness.

Mr. BESSON. I am cross-examining with respect to this document which he says he signed, a contract binding—I am asking for the circumstances under which it was executed.

Mr. KESSLER. It has nothing to do with stock or the purpose of this offer, how much stock he holds.

The COURT. He says he is the president of the corporation, and he executed the contract. I will let you go as far as to ask what his authority was, and let him answer that question, Mr. Kessler.

Mr. KESSLER. Suppose he had no authority. What difference does it make, the corporation might ratify later. Nobody can complain but the corporation. This is immaterial. The line is not material here.

Mr. BESSON. I think it is because we are going into the question as to whether this was an actual bona fide ownership of a piece of property.

Mr. KESSLER. You can argue that to the Court later. We only want to offer the evidence.

The COURT. I will let you ask that question, Mr. Besson.

Q. Where did you get your authority to execute this contract?

A. At the meeting.

Q. Meeting of what?

A. Held of the Matoil Service and Transport Company.

Q. The board of directors?

A. Yes, sir.

338 Q. Who were the board of directors present at the meeting?

A. Fred E. Oleson, Margaret Wettrell and myself.

Q. Have you got the minutes of the corporation?

A. Yes, sir.

Q. Are they here with you today?

A. No, sir.

Q. Have you got the certificate of incorporation with you here today?

A. We have not. I was not asked to bring those things but they are all on file. They are on file with the Government. They are filed in the recorder's office in the United States Custom House.

Mr. BESSON. No objection at this time.

The COURT. All right.

(C–5 for identification received in evidence.)

Direct examination by Mr. KESSLER:

Q. Under these two contracts were these three boats completed?

A. Yes, sir.

Q. Were they turned over to your company?

A. Yes, sir.

Q. By the builders?

A. Yes, sir.

Q. I show you Exhibit C–1 for identification and ask you if you know the signature of George H. Bates, which appears on that paper [indicating]?

A. Yes, sir.

Q. And did you see him sign that paper?

A. Yes, sir.

Mr. KESSLER. I now offer the paper in evidence.

339 Mr. BESSON. Objected to on the ground it is not admissible.

Mr. KESSLER. There is a United States case, your Honor, where proof can be put in that form.

Mr. BESSON. I think it is in direct contravention of that statute which was cited this morning. The United States is a third party insofar as this arrangement between the parties is concerned, and the contract that they have made here provides for a delivery of the boat by a bill of sale.

Mr. KESSLER. What difference does it make? Suppose they never gave us one? Does that mean we are not owners?

Mr. BESSON. As far as the Government is concerned you are not owners.

Mr. KESSLER. How can this man complain?

Mr. BESSON. The statute provides it.

Mr. KESSLER. The statute you read this morning?

Mr. BESSON. Yes.

Mr. KESSLER. I charge you to show it to us again. I thought you were simply giving an academic dissertation, but not relating to this case. I didn't see anything there really to it.

Mr. BESSON. I will read it again.

The COURT. All right. Read it again.

"No sale, conveyance, or mortgage which, at the time such sale, conveyance, or mortgage is made, includes a vessel of the United States, or any portion thereof, as the whole or any part of the property sold, conveyed, or mortgaged shall be valid, in respect to such vessel, against any person other than the grantor or mortgagor, his heir or devisee, and a person having actual notice thereof, until such bill of sale, conveyance, or mortgage is recorded in the office of the collector of customs——"

Mr. KESSLER. We agree with that law. The United States is not an innocent purchaser for value without notice or anything of that kind.

Mr. BESSON. In support of that the rule is a bill of sale not regularly executed, not recorded, is not admissible in evidence under the cases. I think that was cited this morning.

Mr. KESSLER. Does not the prosecutor understand the thing he has read? It is only not good against an innocent holder, buyer. It is not involved in this case.

Mr. BESSON. Yes; because the Government is involved in this case.

Mr. KESSLER. The Government is not an innocent purchaser.

Mr. BESSON. We allege the title to this vessel passed to the United States by forfeiture. Somebody else said, "We own this vessel", and therefore they have to prove their ownership.

The COURT. Let me see that statute?

Mr. BESSON. I would also like to show you this text too in Corpus Juris.

Mr. KESSLER. May I respectfully suggest to your Honor this thing is recorded and the prosecutor proved it by offering the ship's papers.

Mr. BESSON. Those papers are not recorded.

Mr. KESSLER. I am talking about the recording of the proofs of ownership.

The COURT. All right. Give me a minute to read the statute itself. [Reading to himself.]

Have you got that Gene L Case, 286 Fed. 727, there?

Mr. BESSON. Yes; we did have it, 286 Fed. 727. There is another case in 5 Law Edition. [Handing books to the Court.]

(Books sent for.)

Mr. KESSLER. While we are waiting for that may I suggest your Honor read the evidence offered by the Government and accepted at the last hearing, the ship's papers which prove everything we want to prove, they even prove the incorporation. They proved it. We don't offer it. They proved it themselves. [Handing paper to the Court.]

The COURT. You see as between a creditor of the "Evelyn", for instance, this conveyance would not be good, Mr. Kessler.

Mr. KESSLER. I don't agree with your Honor, but I don't want to get into that controversy because it has no relation to this case.

The COURT. I don't want to get into any controversies either.

Mr. KESSLER. I don't want to confuse the issues involved. I want to keep them confined to what is really the question.

The COURT. Here is a case that says in its syllabus, a bill of sale to a boat is not admissible as evidence of title where it was not recorded in the office of the collector of customs, in the home port of the vessel, as required by this section of the Revised Statutes.

342 Mr. KESSLER. That is fine. Of course, your Honor must bear in mind, in the first place, you have the evidence that it was recorded offered by the Government.

The COURT. No; there is not any evidence of its being recorded.

Mr. KESSLER. Yes; here it is.

The COURT. Where?

Mr. KESSLER. I am referring to the Government's Exhibit G-1. It says the Matoil Service Co., a corporation of the State of Delaware is the sole owner of the vessel called——

The COURT. That is not the recording. That is the enrollment.

Mr. KESSLER. That is the equivalent to the recording, your Honor. We don't know of any other recording. That is one question. The second proposition is——

Mr. BESSON. The authorities show enrollment is not proof of ownership.

Mr. KESSLER. I am not asking that to be put to proof. That is one of the things you did prove, whatever the value of it is.

Mr. BESSON. It has no value for that purpose.

Mr. KESSLER. The other point I desire——

Mr. BESSON. It simply shows the purpose for which this vessel is licensed.

Mr. KESSLER. The other point I desire to make without further interruption is that that is a new boat and does not require a transfer of title by bill of sale. There cannot be any question about that. It is a fundamental question.

343 Mr. BESSON. If the Court please, in the other——

Mr. KESSLER. Here is what I was referring to. As it appears by the certificate of the United States Dry Dock Co., builder on file in this office. [Indicating.]

The COURT. Yes. That doesn't bring it within this recording act. That makes it the enrollment of the vessel. The enrollment of the vessel and recording of the bill of sale are two different things. However, I cannot conceive that a man could not come in and prove his ownership even if it was not recorded in a case like this where the Government is holding, and that the Government shall be in the same position as an innocent creditor, which is very evident what this recording act was directed to.

Mr. BESSON. Well, if the Court, please, this contract that was offered in evidence here definitely provides for a bill of sale and shows that the title to the boat remained in the United Dry Docks Company until the deposit of the final $15,000.

The COURT. Yes.

Mr. BESSON. And there was some other final payment so that the title remained in the United Dry Dock Company until a bill of sale was delivered.

Now, title to real property or title to personal property can pass in one of several ways. Now, one of the ways of passing title is by forfeiture. Under the theory of forfeiture to the Government the title to this boat passed to the Government at the very time of the violation of the navigation law and reached back to that
344 time. Now, the Government stands in a position of third party acquiring title under such circumstances. Now, in the face of that the claimant comes in to prove his title and the law prescribes that he cannot do it.

The COURT. Unless the bill of sale is recorded.

Mr. BESSON. Yes.

The COURT. No; I don't think that applies, Mr. Besson. I cannot agree with you.

Mr. BESSON. In this case I would like to call your Honor's attention to the fact that here was a vessel captured—if you want me to read it.

The COURT. If you have a case involving the Government it would be interesting.

Mr. BESSON. "In this case, if the cause had stood solely upon the evidence before the Circuit Court, we should have no difficulty in affirming its decision. But upon the new proofs which have been since taken, and are now produced to this court, it is apparent that the capturing vessel was originally built, equipped, manned, and armed in the United States for a cruise, being owned by citizens of this country, and sailed with the intent of cruising against Spain. It is true that she went to Buenos Ayres, and sailed under the colors of that government on a second cruise, during which this capture was made; but, there is no satisfactory evidence that the American ownership ever ceased, or that there was a real, bona fide sale at Buenos Ayres. If such a sale had really taken place, it was perfectly in the power of the captors to have proved it, in the clearest manner. A bill of sale is the customary and universal document by which the ownership of vessels is evidenced; and the want of any document of this nature, or of any direct and positive evi-
345 dence of an actual sale, leaves no doubt in the mind of the court, that no such sale ever was made. The consequence is, that the capturing vessel must still be considered as owned in the United States; and, according to the decisions which have already been made, the capture was illegal, and the property must be restored to the original Spanish owners."

Now, that decision I think was handed down prior to this other statute.

The COURT. Yes; it is very plain, Mr. Besson, as I see it, that there there was no evidence of any passing of title at all, it was not a question of whether or not it was recorded, there was no evidence the bill of sale had passed, there was no evidence they had title to it. Here there seems to be an effort on the part of this claimant to come in and show where he got the boat, from whom he got it, how he got it, and now he produces a paper which shows he paid in full for it, which he says was signed by the dock company when he paid the money, as I understand it. Is that right?

The WITNESS. That is right.

The COURT. You raised the question that bill of sale or this receipt, not having been recorded, he cannot put it into evidence. that it is invalid as against the United States.

Mr. BESSON. Yes; I still contend that.

The COURT. I don't agree with that contention. That would presuppose a situation where the Government could seize and hold a vessel against the bona fide owner simply because he had not taken advantage of the recording acts provided by Congress. I cannot conceive that that is so.

Mr. BESSON. That is it, because it is a serious question, of course, I want to——

346 The COURT. Further than that there is another situation that that only applies where there is no notice to the third party, and it is a grave question in my mind whether giving to the Government notice, "I am t ," is not such notice as would even put them on some sort of notice if they were even a creditor libellant against the boat.

Mr. BESSON. Now, do I understand counsel is renewing the offer of these three documents in evidence?

The COURT. I think he is; yes.

Mr. BESSON. 1, 2, and 3.

Q. Do you identify the signature?

A. Yes; on the first one.

Q. Was it signed in your presence or not?

A. Yes, sir.

Mr. KESSLER. I offer it in evidence, Exhibit C–1.

Mr. BESSON. Objected to on the ground that the best method of proof is proof by Bates himself.

The COURT. Well, I think I will admit it. You may have an exception if you need one.

Mr. BESSON. Yes.

The COURT. I am not sure about these exceptions.

(Government's counsel prays an exception, which is hereby allowed and sealed accordingly.) (Sealed.)

The COURT. You may cross-examine him as to where he was at that time.

Mr. BESSON. Yes; I would like to.
The COURT. Before that is actually admitted.
Mr. KESSLER. All right.

347 Cross-examination by Mr. BESSON:

Q. Where were you, Mr. Mathiasen, when this thing was signed?
A. At 25 Broadway, in the office of the United Dry Dock.
Q. How much money had you paid on account of this boat, the "Evelyn", or had the Matoil Service and Transport Company?
Mr. KESSLER. That is not proper.
A. At the date——
Q. Yes; September 22, 1932.
The COURT. I will let him ask it.
A. It was paid in full.
Q. How much was paid at that time?
A. The last payment, pardon me, what boat is that referring to?
Q. The "Evelyn."
A. There are two different contracts there.
Q. Motor oil screw vessel "Evelyn."
A. The last payment was $4,000, left a balance to be paid.
Q. Was Mr. Rogers there, George Rogers?
A. No.
Q. You know George Rogers?
A. Yes, sir.
Mr. KESSLER. May I submit again I don't want——
Q. Did he contribute anything to the company to pay——
Mr. KESSLER. I submit this is not proper cross-examination at this time.

348 The COURT. I don't think that is proper. I didn't open the way for cross-examination generally, Mr. Besson, only as to the——

Q. Who else was present beside Bates and yourself at the time this was done?
A. Mr. Hallock, of United Dry Dock, the assistant vice-president of the United Dry Docks.
Q. Was the money that you paid taken from the treasury of the Matoil Service and Transport Company?
Mr. KESSLER. Objected to. This has nothing to do with the relevancy of this paper in evidence at this time.
The COURT. Yes. That objection is sustained.
Q. Did you make any objection at the time to not receiving a bill of sale?
Mr. KESSLER. Objected to as immaterial. It has nothing to do with this paper at this time. The paper speaks for itself.
The COURT. Yes. Sustained.
Mr. BESSON. All right.

By the COURT:

Q. Why is it that this receipt referring to the letterhead portion of C–1 is clipped to a form that is made out in blank, if you know, Captain. Do you understand what I mean by that question?

A. Yes. We filled out a bill of sale and forwarded it to the United Dry Dock to be signed.

Q. That refers to the printed form part of this?

A. Yes.

Q. Is that the idea?

A. Yes.

Q. Yes.

349 A. And the United Dry Dock filed with the Government in the custom house a builder's certificate, with the bond that the boats were paid for in full, and the Government would not accept a bill of sale when, under the same title if the builder's certificate was filed, we could not file a bill of sale because they had given them, the Government, the full description of the boats, and so forth.

Q. Do you know who prepared this form?

A. Yes.

Q. Who?

A. Mr. Schneider.

Q. Of Kirkland & Schneider, the customs house brokers, I suppose?

A. Right.

Q. They were your brokers?

A. Yes.

Q. Representing you in this transaction?

A. Yes; and I also took this and asked Mr. Wilson, which are the head man of, I don't think you call it the law division either, but he passes on all this, he says it is impossible, you can't file a bill of sale——

Q. You can't tell us what Mr. Wilson said. That is what I wanted to know.

A. All right.

The COURT. I think this man can show it is not the custom for a bill of sale to be given by a builder to a man for whom the building is done.

Mr. BESSON. May it please the Court, that is a ridiculous situation because right in the face of the contract it is provided a bill of sale should be given.

Mr. KESSLER. Apparently the person who drew it didn't know it.

Mr. BESSON. The time is prescribed and the circumstances under which it shall be given.

350 Mr. KESSLER. What does that mean?

Mr. BESSON. That means title did not pass under that contract until a bill of sale was given.

The COURT. This purports to be a bill of sale, as I take it.

By Mr. KESSLER:

Q. I show you Exhibit C–3 for identification.

The COURT. So the record is straight, you were offering that and Mr. Besson wants to get his objection on the record. Isn't that so, Mr. Besson?

Mr. BESSON. Yes, I do. I want to make the objection that this bill of sale or this document, C–1, is not admissible in evidence because it is not a bill of sale, recorded as prescribed by the provisions of Section 921 of Title 46, U. S. C.

The COURT. All right. Now, the objection to the offer will be overruled and you may have an exception Mr. Besson. Let it be admitted in evidence.

(Government's counsel prays an exception, which is hereby allowed and sealed accordingly.) (Sealed.)

(C–1 for identification received in evidence.)

The COURT. Maybe we can save some time.

Mr. BESSON. Were those two others simultaneously executed?

Q. Were they executed at the same time, C–2 and C–3 for identification, at the same time?

A. Yes, sir.

351 Cross-examination by Mr. BESSON:

Q. And Mr. Bates signed them both in your presence?

A. Yes, sir.

Mr. BESSON. I would like to make the same objection to the admission of C–2 and C–3 for identification.

The COURT. There will be the same ruling of the Court, saving you your exception, Mr. Besson.

(Government's counsel prays an exception, which is hereby allowed and sealed accordingly.) (Sealed.)

(C–2 and C–3 for identification received in evidence.)

By Mr. KESSLER:

Q. Now, Captain Mathiasen, at the same time that you received Exhibits C–1, 2, and 3 now in evidence, did you also receive these two bonds (indicating)?

A. Yes, sir.

Q. Do you know Mr. Hallock's signature?

A. Yes, sir.

Q. I point to what appears to be his signature and ask you if that is his signature?

A. Yes, sir.

The COURT. The District Attorney wants to ask you a few questions about that signature, Mr. Mathiasen.

Cross-examination by Mr. BESSON:

Q. Did you arrange for the execution of this bond, that is C–6 for identification?

352 A. Yes, sir.

Q. Who paid the premium?

A. The United Dry Dock.

Q. This bond was never recorded anyway, was it?

A. No.

Q. You spoke of a certificate and bond being recorded, didn't you, before?

A. I am talking about the builder's certificate to the Dry Dock.

Q. And the builder's bond, didn't you mention a builder's certificate and builder's bond had been recorded?

A. No, didn't say anything about the builder's bonds.

Q. Bond, not bonds. What did you say was recorded?

A. The builder's certificate.

Q. And that is all?

A. Yes.

Q. You brought no copy of that record with you here today, did you?

A. No. They are on file in the customhouse.

Mr. BESSON. The only objection I have to these documents is that they are irrelevant and immaterial to the issue before the Court.

The COURT. Well, I think they are elements in the ownership. As I have said, I think they are rather cumulative evidence, but I will admit them, if that is your only objection.

(Government's counsel prays an exception, which is hereby allowed and sealed accordingly.) (Sealed.)

(C–6 and 7 for identification received in evidence.)

353 By Mr. KESSLER:

Q. Captain Mathiasen, I show you C–8 for identification and ask you whether that bears your signature (indicating)?

A. Yes, sir.

Q. Did you sign that?

A. Yes, sir.

Mr. KESSLER. I should like to offer that in evidence.

Mr. BESSON. Objected to on the ground that the subscribing witness, Frank Carter, is necessary to the proof of this document, or a satisfactory explanation for his absence, or nonavailability.

Mr. KESSLER. Your Honor will see——

The COURT. He is one of the parties.

Mr. KESSLER. He is not a subscribing witness.

The COURT. He is a subscribing witness to the other signature.

Mr. KESSLER. Yes; but we only have to prove his signature. Even if it was a subscribing witness, if we can produce the man who signed it as proof of the subscribing witness, that is all we have to prove. This morning that was the complaint that we didn't prove it and now there is apparently another complaint.

Mr. BESSON. I think that rule is a very old one. It is stated in corpus juris, "* * * the general rule is that the execution of an attested instrument must be proved by the subscribing witnesses if they, or any one of them, can be produced at the trial or hearing

and are competent to be examined. This rule applies both
354 to instruments under seal and to instruments not under seal;
and its application extends not only to instruments which are required by law to be attested, although this is not necessary to their validity."

The COURT. Have you any idea where this man Carter is, Captain?

The WITNESS. No, sir; I have not.

The COURT. All right.

Mr. KESSLER. I make the offer. Any other objection?

The COURT. You might ask him a few more preliminary questions before you make the offer.

Mr. KESSLER. As to what, Carter, your Honor?

Mr. BESSON. Where this signature was put on.

The COURT. Where it was put on and how it came to be made, and that sort of thing.

By Mr. KESSLER:

Q. Who drew these papers?

Mr. KESSLER. May I refer to all three at one time?

Mr. BESSON. I think you can just refer to them by number.

Q. Who drew Exhibit C-8?

Mr. BESSON. What are they?

Q. C-8, 9, and 10 for identification?

A. You mean this whole thing?

Q. Yes.

A. Mr. John T. Hughes.

Q. That is the vice president of this company who was on the stand?

355 A. Yes, sir.

Q. After they were drawn what did you do with them?

A. I sent it over to my attorney for approval.

Q. After that did it come back to you?

A. Yes, sir.

Q. What happened after that?

A. Mr. Rogers picked it up.

Q. Where did he pick it up from?

A. At our office.

Q. You gave it to him at your office?

A. Yes.

Q. What did he do with it?

A. He wanted the papers to take it to his attorney to look them over before he would sign them, and mailed them back to our office, and that is why——

Q. Did you get them back by mail?

A. Yes, sir.

Q. When they came back by mail were they executed?

A. Yes, sir.

Q. What signatures were on there when they came back?

A. Just the way they are now, George Rogers and Frank Carter.
Q. You had never seen Frank Carter yourself?
A. No, sir.
Q. After they came back you executed them; then did you sign them as president of the Matoil Company?
A. Yes, sir.
Q. Did you then send copies to Mr. Rogers or did he call for them?
A. He kept the copies out.
Q. Oh, he kept the copies out.
A. There were four copies were sent down.
356 Mr. KESSLER. I now offer these three exhibits.
Mr. BESSON. I would like to cross-examine.

Cross-examination by Mr. BESSON:

Q. Who is this George Rogers?
A. I don't know exactly who he is.
Q. You have seen him, haven't you; talked to him?
A. Yes, sir.
Q. What does he look like?
A. Oh, a man approximately about, weighing approximately, I guess, 180 to 90 pounds.
Q. How old a man?
A. I would say forty-eight, fifty years old.
Q. And color of eyes, hair?
A. Blue eyes.
Q. Blue eyes?
A. Yes.
Q. What color hair?
A. Very gray hair.
Q. Where did you first meet Rogers?
A. At the maritime dinner, what I call a maritime dinner, that is, a dinner we have for all associations, you know.
Q. As a matter of fact, Rogers was the man that got you to build these boats, wasn't he?
A. Yes, sir.
Q. He paid you the money with which you were to build them?
A. Well, not all of them.
Q. And it was after you met Rogers the Matoil Oil and——
Mr. KESSLER. I object.
Q. Service and Transport Company was organized, wasn't it?
357 Mr. KESSLER. I submit that is not proper cross-examination.
The COURT. No.
A. I can't answer——
The COURT. When they are objecting the best thing you can do is to keep quiet. [To the witness.]
I think you can go into it on cross-examination regularly, but you see you can't now.

Mr. BESSON. I know. Here is a document, if the Court please, offered in evidence, apparently three charter parties with respect to three vessels. Now, I have a right to know, the subscribing witness is not produced as to Rogers——

Mr. KESSLER. What has that got to do with the money?

Mr. BESSON. This man says he doesn't know who the subscribing witness is or where he comes from.

The COURT. Yes, Mr. Besson.

Mr. BESSON. I want to find out whether this is a bona fide document, I mean whether in the first place—the proper method of proving—the document is not offered on behalf of the claimant, the proper method being to produce the attesting witness, and I submit there has been no explanation here for his absence, and I want to develop who Rogers or what this claimant knew about him or the president of the claimant corporation and all of the circumstances connected with Rogers.

The COURT. Yes; I will let you do that as against the paper as soon as it is in evidence; I mean your cross-examination. After
358 all this man is the owner practically, representing the Matoil Company, and you can have a general cross-examination.

Mr. BESSON. Now, suppose, if the Court please, this man Rogers had been the man who really bought these boats and put up the money to construct them.

The COURT. Well, of course——

Mr. KESSLER. The prosecutor is not saying that is so.

Mr. BESSON. Now, this witness comes along and says he doesn't know who this subscribing witness is. Apparently he has made no effort to get him or Rogers here.

The COURT. Now, Mr. Besson, he says he doesn't know who the subscribing witness is. He says merely this is a paper that he executed to Rogers for the company and that it was executed in the manner as he has described its being executed. I see no objection to its being put in evidence. You will have a full opportunity to examine him generally, I think with the thing in evidence. It will widen the scope of the examination, as a matter of fact.

Mr. BESSON. I enter the objection.

The COURT. You have your objection and I will grant you an exception if you need one.

(Government's counsel prays an exception, which is hereby allowed and sealed accordingly.) (Sealed.)

(C–8, 9, and 10 for identification received in evidence.)

359 Direct examination by Mr. KESSLER:

Q. Now, Captain, since the time that you had these boats built for yourself, for your company, have you or your company ever transferred title to these boats?

A. No, sir.

Q. Are you still the owner of these boats?
A. Yes, sir.
Mr. KESSLER. You may cross-examine.

Cross-examination by Mr. BESSON:

Q. As a matter of fact, you don't know whether you have ever even gotten title to the boats, do you?
Mr. KESSLER. Objected to.
Q. You never got a bill of sale. You assume that the Matoil Service and Transport Company has got the title?
A. I know for a fact they got the title.
Q. You say you met this fellow Rogers at the maritime association dinner. When was that dinner?
A. February; I don't know exactly the date.
Q. Was it 1932?
A. Yes, sir.
Q. And did you at that time engage in a conversation with Rogers with respect to the construction of these vessels?
A. Oh, no.
Q. Well, when, how long after?
A. He came down to my office about a week after.
Q. You struck up a friendship at the dinner?
A. Yes, as usual, that is what all of those fellows generally——
Q. He came to your office and what, if anything, did he say at this visit?
360 A. He wanted to know if I could charter any boats for carrying oil, as he was very well connected with the various different oil companies, and that he could get the business if he had the proper boats. I tried all over to charter boats. If you care me to name it——
Q. No. You tried to charter boats and you could not?
A. Charter boats and we could not get the boats that was proper for carrying gasoline or light oil.
Q. Now, at that time the Matoil Service and Transport Company was not in existence, was it?
A. No, sir.
Q. And as a result of your failure to find boats that you could charter——
A. Right.
Q. What did you and Rogers do?
A. Well, he said that if I could get the proper boats or could finance enough to go ahead to build boats that he would give me a four-year charter, four- to five-year charter.
Q. Well, what, if anything, did you say to Rogers then?
A. I told him I will see what I could do. I tried various banks and I could not borrow money enough from the bank to complete this contract. I tried about four or five different banks. He said he would then, when I turned the proposition down, that I could not go through and finance any such proposition as for new boat,

he said he would try through some finance company if they would finance the money to build this boat, say, within 60 or 70 percent, they never will put up all the money, and he worked on that. I would say approximately over a month to a month and a half. We met each other on various occasions.

Q. Where was his office?

A. At 11 and 19 Hudson Street, New York.

361 Q. What floor?

A. I think it was either the fourth or fifth floor; I am not positive exactly what floor.

Q. Was there any name on the door of the office?

A. Oh, yes.

Q. What was it?

A. Rogers Oil and Supply Company.

Q. Well, now, what did Rogers finally do; did he advance the money to you?

A. He advanced a portion of it.

Q. How much?

A. Seventy thousand dollars.

Q. Where did you get the rest?

A. I put the rest in.

Q. How much did you put in?

A. Ten thousand dollars.

Q. So that it cost $80,000 to construct the three vessels?

A. Yes, sir.

Q. And what security did you give Rogers for his $70,000?

A. Give him control of the stock to be held in escrow until I——

Q. He controlled the stock of the Matoil Service and Transport Company, Inc.; is that right?

A. Under the contract. That is the only way he controlled in case I couldn't pay the money back, he would be; yes.

Q. Did he at any time indicate to you that this boat or these boats were to be used to carry grain alcohol?

A. No, siree.

Q. Did he ever intimate to you that he was acquainted with persons high in authority of the Government?

A. No.

362 Q. Sure about that?

A. Absolutely.

Q. Never represented to you his connection with any large corporations or with Government officials?

A. No; not of Government officials.

Q. What corporations did he represent himself to be connected with?

A. He represented himself to me to be very close connected with the Standard Oil and the City Service.

Q. How did he explain to you the fact that he himself wanted to put the money into a corporation in order to charter the boats which

were being built with his money back to his own company and put you in the arrangement?

A. Well, the way it was explained to me on account of he having, being where he was a chairman or officer of Standard Oil or City Service, I do not know, but he placed himself before me that he could not direct be in ownership or build boats himself and charter to these oil companies on account of his connection or being an officer or on account of his title with these oil companies.

Q. And that he could in effect be the owner in this way and using you as a dummy——

Mr. KESSLER. Objected to. That is not what the witness says and the prosecutor has no right to ask him in that way.

Mr. BESSON. I have if the Court allows it.

Mr. KESSLER. I am hopeful the Court won't allow it.

The COURT. All right.

Mr. BESSON. Does the Court overrule the question?

The COURT. Yes; I will overrule it that way, Mr. Besson.

363 Q. Now, you were acting really as a representative of Rogers, weren't you?

A. I wouldn't say——

Q. How was Rogers to get back his money, the $70,000?

A. I was to pay him.

Q. Dividends on his stock?

A. No.

Mr. KESSLER. I object. Let the witness tell you how he is to pay him.

Q. Go ahead and tell us.

The COURT. He is going to tell you.

A. At the rate of $3,500 a month.

Q. Under these charter parties you were to get on the "Evelyn" the power boat, $2,000 a month, weren't you?

A. Yes, sir.

Q. And on the barges $2,500 apiece?

A. Right.

Q. So that the total charter price of these vessels was $7,000 a month?

A. Right.

Q. And you were to pay him back at the rate of $3,500 a month?

A. Yes, sir.

Q. What was to become, was he to get any interest in the meantime on his $70,000?

A. No, sir.

Q. Just the direct payment of principal?

A. Yes, sir.

Q. How was he to benefit by this arrangement?

Mr. KESSLER. Objected to, if the Court please.

Q. If at all.

Mr. KESSLER. If there is any compensation on it, all right.

364 Q. Did he tell you how he was going to benefit by this arrangement?

A. He did not.

Q. Your company, of which the board of directors were yourself, a stenographer, and bookkeeper in your office and a clerk in your office, were the only stockholders in this company besides Rogers, is that the fact?

A. Yes, sir.

Q. And there was to come to you every month $3,500?

A. Yes.

The COURT. $7,000.

Q. There was $7,000 to come to the company every month and the company was to pay $3,500 of it. So that there inured every month $3,500?

A. Right.

Q. Did Rogers give any explanation for making such a generous arrangement with you?

A. No, sir.

Mr. KESSLER. I object to that, too.

The COURT. Well, he has answered, he said there was no explanation.

Q. He did not?

A. The only arrangement, as I explained before——

Mr. KESSLER. You answered the question. There is no question pending.

The WITNESS. Oh.

Q. You never made any use of these boats yourself for any purpose except to charter them to the Rogers Oil and Transport Company?

A. No, sir.

Q. And each boat was chartered for four years?

365 A. Yes, sir.

Q. Now, under a charter arrangement of that kind where a boat is chartered, isn't it the custom to make some record of that with the customs office?

A. I never have done it so far, and I chartered a good many boats.

Q. Do you mean to say that if the navigation laws or the original enrollment and license license the boat for one purpose you might charter it for another?

Mr. KESSLER. Objected to. Whatever the law is, is not the fault of this man or his responsibility at the moment.

The COURT. I think the objection should be sustained, Mr. Benson.

Mr. KESSLER. If it is wrong, it is wrong, no matter what this man says.

The COURT. All right.

Q. Now, under this charter arrangement did you supply a crew on these vessels?

A. I did not.

Q. Were these boats insured?
A. Beg pardon?
Q. Were these boats insured?
A. The paper speaks for itself.
Q. Were the boats insured?
A. I don't think they were.
Mr. KESSLER. I object.
Q. I note these charter parties which have been admitted in evidence C–8, C–9, and C–10 provide for insurance?
A. Yes.
Q. Were insurance policies in fact put into effect and delivered to the corporation of which you are president?
A. No, sir.
366 Mr. KESSLER. Objected to, immaterial.
Q. Never got them?
A. No.
Q. Why not?
Mr. KESSLER. I object as immaterial.
The COURT. He objects to it, let him have a chance. I will let him ask it, Mr. Kessler.
Q. Why not?
A. When the boats was up in a meeting before the insurance company they wanted 17 percent premium on these boats.
Q. You were not paying the premium, the premium was to be paid by the Rogers Oil Supply Company?
A. Very well.
Q. Under your agreement you were to be protected?
A. Yes.
Mr. KESSLER. He is trying to tell you when he didn't get his policy he tried to find out why he didn't get it.
Q. What did you do when you found out the premium was 17½ percent?
A. We decided to let them go then without the insurance.
Q. Who decided?
A. Between myself and Mr. Rogers.
Q. You decided to waive that?
A. Yes.
Q. As a matter of fact, you had to do pretty much what Rogers told you; didn't you?
Mr. KESSLER. Objected to.
A. I wouldn't say that.
Q. This thing was just a sort of a front, wasn't it, this arrangement?
367 Mr. KESSLER. Objected to.
The COURT. You can't ask him that.
Q. When did you two decide that the insurance should be omitted?
A. I will say that was probably in around October, the second or third.

Q. That was about a month after the charter parties were signed?

A. No, sir; after they was signed, but they didn't get the delivery of the boat before in October.

The COURT. I didn't hear that, Captain.

The WITNESS. The delivery of the boat, they didn't complete the boats before practically around October the first.

Q. Was there any particular peculiarity about the construction of the boats?

A. No, sir.

Q. There was a limitation in the charter party as to the area in which the boats were to be operated, was there not?

A. Yes, sir.

Q. The waters within the limits of New York harbor?

A. Right.

Q. Not to go out of the limits of New York harbor unless specifically agreed upon by you?

A. Right.

Q. And additional insurance arranged upon by you with your consent?

A. Yes.

Q. As a matter of fact, you saw these boats up around Troy, New York, didn't you?

A. Yes; I didn't see them up around Troy, but I understand they were on that run.

368 Q. They were of a beam that would enable them to pass through the Erie Canal, weren't they, thirty-eight feet?

A. I do not know if they went up so far as on the canal.

Q. Weren't you concerned about it; didn't you get in touch with Rogers and want to know why these boats were being taken up the Hudson River as far as Troy when the limitation on the use of them was New York harbor?

A. Isn't that part of New York harbor?

Q. I am asking you. You consider that the river up to Troy is the port of New York harbor?

A. Yes, sir.

Q. Even though it is above tide water?

A. Yes, sir. That is within the limit of New York harbor and tributaries. I don't know if tributaries is in there.

Q. The word "tributaries" is not in there?

A. Even, it doesn't matter. It is part of New York harbor, Hudson River.

Q. In your opinion?

Mr. KESSLER. That is all that matters.

A. The boats was, what I mean about the contract that the boats only had to be within the limit of the license of the boat.

Q. Your charter party says the operation of this boat by you during the period of this charter to be confined to the waters within the limits of New York harbor, said boat is not to go outside the

limits of New York harbor unless specifically agreed upon by us and additional insurance arranged upon by you at our consent. Now, were you paid the monthly payments stipulated?

A. Yes, sir.

Q. When did you receive the first payment?

369 A. Well, I will have to get my book. I haven't got the exact date.

Q. Did it come around the first of the month?

A. Right around the 30th, I guess, 29th or 30th of October.

Q. What was it, October?

A. Yes.

Q. Was the money in cash or by check?

A. I got this in cash.

Q. $7,000 was handed to you in cash?

A. It did not, $3,500.

Q. Didn't you think that was strange?

A. No.

Q. Was it in gold or bills?

A. Bills.

Q. What denomination?

A. I don't quite get that.

Q. Was it five hundred dollar bills?

A. No.

Q. Hundred dollar bills?

A. Hundred dollar bills.

Q. Thirty-five one hundred dollar bills?

A. Yes.

Q. When did you receive the next payment on the charter party?

A. I say approximately thirty days, I guess, later.

Q. Now, did your corporation have any agreement in writing with Rogers to pay him $3,500 every month?

A. Yes, sir.

Q. Have you got that here with you?

A. I think my attorney has got it.

Q. Who is your attorney?

A. Mr. McDonald.

Q. This is Mr. McDonald right here [indicating]?

A. Right here.

370 Q. Now, this second payment, was that made in cash or by check?

A. Let me think for a minute. Yes; that was made in cash.

Q. So that would carry you down to the 30th, the last day of November 1932?

A. Yes, sir.

Q. When did you first hear that the boats were in difficulties?

A. When I got back. I was away at the time.

Q. You got married, didn't you?

A. Yes, sir.

Q. And you went away on your honeymoon?
A. Yes.
Q. And when you came back what did you find out?
Mr. KESSLER. That is objected to, if the Court please.
Q. Well, did you get word that these boats had been seized?
A. Yes, sir.
Q. From whom?
A. From Mr. Rogers.
Q. Did Rogers tell you how he found that out?
A. Well, he said his man reported it to him.
Q. The boats were seized?
A. Yes.
Q. Have you seen Rogers since that time?
A. I have not. This was the day after I found this thing out when I come back, when I went to the office, say, about two or three days after, I found the office closed.
Q. Did you see anyone there and make any inquiry?
A. Yes.
Q. Whom did you see?
371 A. I do not know who the man was.
Q. You saw an Italian there, didn't you?
A. Yes; I don't know if he was an Italian, I couldn't say that, but I did—when I was hanging around the floor on the outside, he wanted to know if I was looking for Mr. Rogers and he said he was looking for him himself, he said, "It doesn't look like he is going to be here."
Q. Did he say to you, "Is it about your boats?"
A. No; he did not.
Q. You are sure about that?
A. Absolutely.
Q. Do you know this Frank Rizzo?
A. Who?
Q. Frank Rizzo?
A. No.
Q. Do you see him here in the court room, do you see the man in the court room that you saw outside of the door?
A. No, sir.
Mr. BESSON. Is Frank Rizzo in court?
A VOICE. Yes. [A man arose in the court room.]
Q. Did you see that man who is now standing up, the man that I am indicating who is now standing up in the court room, did you see him outside the door of Rogers' office?
A. He looks something like him, but I am not positively sure that is the man.
Mr. BESSON. All right. Sit down.
Mr. KESSLER. Come up here. [Mr. Rizzo does as directed.] Take a look at him. Does that look like the man who was up there?

The WITNESS. He looks like him, yes; but I am not positively sure he is the man. You see a man with a hat, not dressed up and a coat on, naturally you can't——

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Q. Now, have you seen Rogers at all since this thing occurred?

A. No, sir.

Q. Don't know what has become of him?

A. No, sir; I do not.

Q. You never saw this man Rizzo, not Rizzo, but the man you saw outside of the office there, since that time unless you saw him here in the court room today?

A. Yes, sir.

Q. Have you made any search for Rogers?

A. I have.

Q. As it stands now, you have only gotten back $7,000 out of the $10,000 you have invested?

A. That is right.

Q. What investigation, if any, did you make into Rogers before you entered into this transaction with him?

A. I didn't do any investigation.

Q. You just took it on faith?

A. Well, through meeting the man on various times.

Q. You met him at a dinner?

A. Yes.

Q. And then a week later he came to your office and had this conference?

A. Yes.

Q. And then you started your arrangement about financing the boats, didn't you?

A. No, sir; we did not.

Q. Did Rogers give you any reason at any of these times you conferred with him as to why he didn't want to be personally connected with the ownership of the boats?

A. I explained that before through his connection.

Q. That it would injure him in his connection with the oil companies?

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A. Yes.

Q. In other words——

Mr. KESSLER. Your Honor—go ahead.

Q. He could not safely do it under his arrangement with the oil companies.

Mr. KESSLER. Objected to. This witness has not said he was connected or didn't want to be connected. He said he couldn't be the owner and didn't want to buy the boats.

The COURT. Yes, I think you have gone into that, Mr. Besson.

Q. Did he account for the reason of giving you cash in payment of the charter parties?

A. He did not.

Q. Did he give any reason why he didn't want a record made of a full payment of $7,000 and a repayment to him?

Mr. KESSLER. Objected to. There is no evidence he didn't want any record made.

The COURT. I don't remember his saying so.

Mr. BESSON. I know, I am not asking——

Mr. KESSLER. It is improper. It assumes that testimony is in the record and it is not.

Mr. BESSON. The testimony is that $3,500 in cash was paid on two occasions at the end of the month of November and the end of the month of October, and it was half of the amount prescribed in the charter party.

Q. I mean did he give any reason for not paying the full amount in the charter party?

A. That was in the agreement.

374 Q. In what agreement?

A. Drawn between the Rogers Oil and Supply Company and the Matoil Service and Transport Company.

Q. Where is that agreement?

A. Just mentioned it was turned over to my attorney.

Q. That is Mr. McDonald, is it?

A. Yes, to deduct the——

Mr. BESSON. Have you got it here, Mr. McDonald.

(Paper produced.)

Mr. HALLE. It is a copy.

Mr. BESSON. Now I ask that this be marked for identification.

Mr. KESSLER. We offer it in evidence.

Mr. BESSON. I don't know as you can offer it in evidence.

Mr. KESSLER. You cannot demand the paper from us, inspect it, and then not offer it. You asked for it, you inspected it.

Mr. BESSON. I have no objection to its being marked for identification at this time. I want to ask the witness a question about it.

Mr. KESSLER. Your Honor, we make the offer on behalf of the prosecution. The prosecutor must offer it. If he doesn't, we make an offer on his behalf. The law is, he cannot refer to it otherwise.

Mr. BESSON. How do we know what it is.

Mr. KESSLER. Once you demand a paper from us and inspect it you must offer it.

Mr. BESSON. That is not the rule.

375 Mr. KESSLER. I insist that is the law. You cannot gamble on what is in a paper and not offer it.

Mr. BESSON. I ask it be marked for identification at this time.

Mr. KESSLER. I refuse to show it to anybody [indicating].

Mr. BESSON. A paper has been produced from the pocket of one of the attorneys, nobody knows what is on the paper, and now counsel say I must offer it in evidence. That is a preposterous situation.

Mr. KESSLER. You called for this paper.

Mr. BESSON. I asked you to produce this contract.

Mr. KESSLER. All right, sir; we have the contract. If the prosecutor calls for it and desires to see it, I suggest under the law——

The COURT. You can't make him offer it in evidence.

Mr. KESSLER. Yes, your Honor.

The COURT. I would like to see some law on that. You can put it in evidence yourself.

Mr. KESSLER. No; we can offer it in his behalf.

The COURT. I don't so understand.

Mr. KESSLER. What is your Honor going to do if we dont' produce it?

The COURT. All right, let me see the law. It might be found in the Warden case, 123 Fed.

Mr. BESSON. I will produce the Warden case, your Honor.

376 Mr. KESSLER. You don't have to decide the question now. If I am right he will have to take it, that is all. If the prosecutor demands it, the record shows the prosecutor demands it, and we produced it.

The COURT. Let him have it and go through with his examination and then you are going to offer it on behalf of the prosecutor?

Mr. KESSLER. Yes.

The COURT. And I will either reject it or admit it.

Mr. BESSON. I ask it be marked for identification.

The COURT. Maybe at that time he will want to offer it himself.

(Paper marked G–5 for identification.)

Q. This document, G–5 for identification, what is it, if you know?

Mr. KESSLER. I object unless it is in evidence. The witness cannot be examined from it.

Mr. BESSON. How could you develop even what it is?

Mr. KESSLER. That is all right.

Mr. BESSON. There is nothing before the Court to indicate what this paper is.

Mr. KESSLER. You called for a paper, you can't examine the witness from it unless it is in evidence.

Mr. BESSON. I submit that is not the law.

The COURT. I don't think it is the law.

Mr. BESSON. Counsel here have undertaken to——

377 The COURT. What is the question you asked about the paper?

Mr. BESSON. I want to develop first what the paper was, if he knew.

The COURT. The paper speaks for itself, which is an objection which you frequently interpose.

Mr. BESSON. I know the paper speaks for itself but I am asking for him to inform the Court what he knows about this paper.

Mr. KESSLER. That is what we object to. The paper still speaks for itself.

Mr. BESSON. I don't mean as to the contents of the paper.

The COURT. You asked him about a specific contract and he told you he had given the contract between the Matoil Service and Transport Company, Inc., and the Rogers Oil Company to his attorney. Now, his attorney produces that paper. Is this the contract you refer to?

Mr. BESSON. Yes.

Q. This G–5 for identification, is that the contract or the agreement that you refer to, examine it, as being the one that you gave to your lawyer?

A. (Witness examines paper.)

Q. Is it?

A. Yes, sir.

Q. That is.

Mr. BESSON. Now, I have no objection to that going in evidence.

The COURT. Everybody is happy.

Mr. KESSLER. On the part of the Government.

Mr. BESSON. Not on the part of the Government.

378 The COURT. How can he offer it in his cross-examination?

Mr. KESSLER. I am willing to let him do it.

Mr. BESSON. It cannot be done at this time.

The COURT. It is going into evidence?

Mr. KESSLER. On the part of the Government. You cannot blow hot and cold at the same time.

Mr. BESSON. This is the claimants' case.

The COURT. He has no objection to its going in evidence. What difference does it make?

Mr. KESSLER. It may make a great deal of difference, you Honor. Of course, I might suggest when he makes the offer he is bound by it. That is the great deal of difference it does make, of course.

Mr. BESSON. I have not offered the agreement on behalf of the Government.

The COURT. You have no objection to their offering it in evidence?

Mr. BESSON. Not at all.

The COURT. All right.

Mr. BESSON. And they don't offer it in evidence.

Mr. BESSON. They cannot offer it when you are cross-examining.

Mr. BESSON. I would waive the right to object to their offering it in evidence at this time if they choose to do so.

The COURT. You are being just as nice to him as he is to you.

Mr. KESSLER. It has become elementary now, but there is the law [handing book to the Court]. That can never be evidence against us.

379 The COURT. Oh, well, this doesn't say that. Read it. That says he can't prevent you once having called for it, from putting it in evidence, which I agree to.

Mr. KESSLER. But it can only be used as evidence for us and not against us.

The COURT. That is what I say. But in addition to that he says, "I won't object to your putting it in evidence."

Mr. KESSLER. He must offer it.

The COURT. Read the paragraph. That doesn't say he must now use it in evidence in his case and be bound by it.

Mr. KESSLER. It cannot be used against us; it can only be used for us.

The COURT. Where does it say that? Just read it to me. When you look at it quickly it might look that way, but if you read it slowly it doesn't.

Mr. KESSLER. What is really meant is it is therefore made evidence in favor of.

The COURT. Surely.

Mr. KESSLER. In favor of, not against. He must offer it because it cannot be used against us and he must be bound by it.

The COURT. "While a party calling for the production of papers is not required to read them in their entirety, he cannot call on his adversary for the production of documentary evidence and, when so produced, claim the benefit of such portion thereof as may be to his advantage and at the same time deprive the adverse party of the right to use such part as may tend to the latter's interest."

Mr. KESSLER. That is right. Continue on there.

380 The COURT. "In many of the decisions the rule is laid down that papers which are produced on notice and submitted to the inspection of the other side become by reason of such production and inspection evidence for both parties at the trial. This rule is, however, too broadly stated, in that it presupposes the admissibility of the documents in favor of the party calling for them, for it is obvious that the mere production and inspection of documents does not of itself render them admissible in evidence, at least in favor of the party calling for them, and what is really means is that, where a party calls for a paper and inspects it, it is thereby made evidence in favor of, but not against, the party who produces it."

Mr. KESSLER. It cannot mean anything else. It means if we offer it it might be used against us in contradiction. He must offer it because it binds him.

The COURT. It does not say he must offer it or that it binds him.

Mr. KESSLER. You will find the other writers say so. That is the only way he can get the benefit of it. It is in our favor and not against us.

The COURT. He might call for almost any kind of a document. When he called for that it might have been some perfectly immaterial and irrelevant paper, and by calling for it he would have made it evidence in his case.

Mr. KESSLER. So long as it could benefit it it must be offered.

The COURT. He cannot object to it; that right is taken away from him; having once called for it and inspected it, he cannot object to its being placed in evidence.

381 Mr. KESSLER. He cannot control it, once he asks for it and inspects it, and that is why they make him offer it. That is what it means. I don't think it is material, but you will find that the treatises on the subject hold that very thing.

The COURT. You see it follows right on: "It follows that the mere production of papers on notice or order does not render them admissible in evidence for the producer, but they become admissible for him only when, and if, the party calling for them inspects them."

Mr. KESSLER. That is right.

The COURT. In other words, you are now at liberty to offer those in evidence, whether they are admissible or not.

Mr. KESSLER. I will send the cases down to you to show you it must be offered. I can offer it in his behalf and your Honor must accept it in his behalf as a matter of law. It cannot be used against us any more, it can only be used in our favor, otherwise it is no good.

Mr. BESSON. What are you going to do, reoffer it?

Mr. KESSLER. No. I haven't done anything with it.

The COURT. To get the thing to a head, if that is what we are waiting for, you offer it on his behalf.

Mr. KESSLER. I don't offer it at all. I stand mute for the moment.

The COURT. All right. He has said he has no objection to the paper being offered in evidence as far as you are concerned. All right.

382 By Mr. BESSON:

Q. You know nothing about the cargo of this vessel?

A. No, sir.

Q. When you found out that the vessels, boats had been seized did you go to the seizure point or did you make any inquiry or investigation?

A. I immediately turned it over to my attorney.

Q. Went to Mr. McDonald?

A. Yes, sir.

Q. Did you yourself do anything further than that?

A. I did.

Q. What did you do?

A. I tried to locate Mr. Rogers.

Q. What, if anything, did you do to locate Mr. Rogers?

A. Well, when I couldn't find him myself I turned it over to Mr. McDonald to see what he could do.

Q. Just a moment. I should like to object in the interest of time because time is becoming important. Anything after the seizure is immaterial in this case.

The COURT. Yes; I don't see the materiality of it. Examination after the seizure is not within the scope of the direct examination.

Mr. BESSON. All right.

The COURT. Is that all?

Mr. BESSON. That is all.

By the COURT:

Q. I would like to ask you a question or two, Captain.

A. Yes.

Q. Mr. Rogers, you say, paid $70,000 toward the consideration of these vessels?

A. Yes, sir.

383 Mr. KESSLER. If the Court please, inferentially that may be correct, but directly the testimony is he loaned $70,000 to this company. They paid for the boats.

The COURT. I didn't understand that.

Q. Did he lend it to the Matoil Service and Transport Company?

A. Yes, sir.

Q. That was between April of 1932 and September of 1932, let us say?

A. No; July, I think it was.

Q. Between July——

Mr. KESSLER. The contract shows July 6th, when the contracts were entered into.

The COURT. I see.

Q. In what payments did he make those sums to the Matoil Company?

A. They were made in various payments, and I haven't got the data. I did give the various dates.

Q. What would be the largest amount, do you recall the largest amount that that was?

A. Nineteen thousand dollars.

Q. Nineteen thousand dollars?

A. Yes.

Q. Was that $19,000 paid by cash or check?

A. By check.

Q. Do you remember the name of the bank?

A. I do not.

Q. Don't remember the name of the bank?

A. We deposited it to our account in the bank. We never do take records, the name of the bank.

Q. No; you wouldn't be likely to take a record of it, but $19,000 is a check of a large amount and I thought possibly you would remember the bank.

A. I do not.

384 Q. Was it a personal check of Mr. Rogers?

A. No; I knew it was a cashier's check.

Q. You don't remember what bank?

A. No; I do not.

Q. But the Matoil Company deposited that check?

A. Yes, sir.

Q. Were the other payments of $70,000 made by check or by cash?

A. Yes, by checks.

Q. Always cashier's checks?
A. Yes.
Q. Don't remember any of the banks?
A. I do not.
I am sure practically it was on the same bank. I didn't take the name of the bank.

Redirect examination by Mr. KESSLER:

Q. Now, Mr. Mathiasen, you described Mr. Rogers' writing on the window on his door when you went to his office?
A. Yes.
Q. Sometime during the course of dealings with him?
A. Yes.
Q. Were you ever inside his office?
A. I was inside.
Q. Had you any idea how much Rogers was getting when these boats were being used for his business or for his purposes?
A. I had not.
Mr. KESSLER. Mr. Rizzo, stand up. [A gentleman arose in the court room.]
Q. This is Mr. Rizzo, did you ever have any business with him, did you ever have any dealings with that man at all [indicating]?
385 A. No, sir.
Q. Under this charter agreement you delivered these boats to Mr. Rogers, did you not?
A. Yes, sir.

By the COURT:

Q. What is your stock interest in the Matoil Company?
A. Eighty per cent.
Q. Eighty per cent?
A. Yes.
Q. The other directors with you were nominal directors?
A. Yes, sir.
Q. What interest did Rogers have?
A. The only interest he had that the stock was given to Mr. Rogers as a security until the boats was paid for.
Q. How much stock?
Mr. KESSLER. You mean until the money was paid back to him?
The WITNESS. Yes.
Q. How much stock?
A. My certificate.
Q. He had no other stock interest?
A. No, sir.
Q. The charter party is invalidated now by the fact you have had no payments since November?
A. That is right.

Q. Or rather, the question might not be fair, you have had no payments under the charter, have you, since November?

A. No, sir.

Mr. HALLE. I will probably save a lot of time by doing this now.

386 Cross-examination by Mr. HALLE:

Q. Just hold these papers marked Exhibits C–8, 9, and 10, look at exhibits for identification R–1, 2, and 3, and I ask you——

The COURT. This is cross-examination on behalf of the claimant Rizzo, is it?

Mr. HALLE. Yes.

Q. I ask you if these three papers marked for identification R–1, 2, and 3, whether they are duplicates of the exhibits in evidence of C–8, 9, and 10?

A. (After looking at papers): It would take too long to read every item.

Q. Does your signature appear on it?

A. Yes, sir.

The COURT. I think we will agree, Mr. Besson will agree these are duplicates.

The WITNESS. It is quite long to read them all over.

The COURT. He doesn't want to read them all over.

The WITNESS. I can.

Mr. BESSON. You wish to substitute the use of the duplicates?

Mr. HALLE. No; we are not substituting. I just want to bring out that these are duplicates of the originals in evidence.

The COURT. One witness already testified that.

Mr. BESSON. Will counsel state to the Court what the purpose is of that.

387 Mr. HALLE. Later on that will develop when I put my claim in. I want to identify the signatures, that is all.

The COURT. All right.

Mr. BESSON. I object. If there is an offer of this in evidence at this time I object.

Mr. HALLE. I am not offering them in evidence.

The COURT. If you want any testimony concerning them—where is that ruling case law? You have got to let him see it all; you can't let him see one little part of it.

Mr. HALLE. There is something on the back here. I have no objection.

Mr. KESSLER. Just show the signature and have it marked.

Mr. HALLE. The other part will become a part of this case later.

The COURT. I understand that.

Mr. HALLE. This witness knows nothing about that. I am just referring to the witness who is on the stand as to what is within his knowledge.

The COURT. You are asking him whether some papers are duplicates of others. There is something on the back which is not on the other.

Mr. HALLE. I am not discussing the back.

The COURT. You must warn him.

Q. Don't look at the back of these papers; just the front which is typewritten.

The COURT. He says he cannot do it without spending quite a lot of time and comparing it all.

388 Mr. BESSON. The only way the man could do it is by comparison.

The COURT. Of course it is.

Mr. HALLE. All he has to do is to put it on a light object and he can see it is a duplicate, carbon copy.

The WITNESS. Yes.

Mr. BESSON. I object to it, if the Court please.

Q. Maybe it will only take him a minute.

A. Yes; these are the duplicates of this.

Mr. HALLE. That is all. All right.

Mr. KESSLER. That is all.

Mr. BESSON. I object and ask that all that testimony be stricken out because those papers are not in evidence.

The COURT. He is not putting them in evidence.

Mr. BESSON. He says the papers are duplicates and yet the Court is denied the privilege of looking at them and so is counsel for the Government.

The COURT. He says they are duplicates. I will let it go in for what it is worth. They are not in evidence yet. Make the objection when they are offered in evidence.

Mr. BESSON. I would like to ask the witness a couple more questions.

The COURT. All right; go ahead.

Cross-examination by Mr. BESSON:

Q. Did you say the money that was paid for the boats, the $70,000, was paid in cash; was it or not?

389 Mr. KESSLER. That is going over it again.

A. No, sir.

The COURT. He said it was paid in checks.

Mr. KESSLER. This is not proper. I didn't open up that subject.

The COURT. The prosecutor says he forgot it and now he remembers it.

Mr. KESSLER. Do you mean you forgot it?

Mr. BESSON. Yes; there was something called to my attention of which I was unaware, and I appealed to the Court's discretion for the privilege of asking a couple more questions.

The COURT. All right. The Court will benignly permit you to ask a couple more.

Q. Directing your attention to the checks that were paid by Rogers——

A. Yes.

Q. To finance the construction of the boats. When was the first check paid?

A. Not to finance the construction of the boats. He loaned it to the Matoil.

Q. He advanced money. Was it $21,000?

A. Yes.

Q. When was the payment made?

A. I haven't got exactly the date, I couldn't remember all these dates.

Q. Was it a cashier's check of the Federal Trust Company?

A. I do not know. It was a check but I do not know what bank it was on.

Q. Didn't you deposit this check in the Bank of Manhattan?

A. Bank of Manhattan?

Q. Yes.

390 A. No.

Q. Where did you deposit it?

A. The Underwriters' Trust Company.

Q. When did you deposit this check of $21,000?

A. The very day when I got it.

Q. That was the 30th of July 1932, or the 30th of June?

A. Somewheres around that time.

Q. And then on the 11th of August you got, or the 11th of July you got another check for $20,000?

A. I think it was around $20,000, yes.

Q. And on the first of September, you got another check for $19,000?

A. Yes; The book record shows that. They were entered right in the books, on the bank deposit sheet, the record.

Q. The first check was on the Federal Trust Company; wasn't it?

A. I don't know.

Q. You don't know. The second check was on the Union National Bank; wasn't it?

A. I do not know.

Q. You mean to say you cannot remember a transaction as important as that?

A. I don't see why I should be interested if a check was deposited in the bank.

Mr. KESSLER. I submit——

Q. The other check was the Federal Trust Company?

A. I don't know.

Q. You don't know?

Mr. KESSLER. The witness says he remembers the transaction but does not remember on what bank the check was drawn. The prosecutor doesn't know.

391 A. If a check goes through——

The COURT. Just a minute.

Q. Now, those three checks I have mentioned brought the amount up to $60,000. Was the balance, the remaining $10,000 paid in cash or by check?

A. By check.

Q. So that there were four checks?

A. There were four checks, yes.

Q. What did you do with the fourth check?

A. Put it in the bank.

Q. In the Underwriters' Trust Company?

A. Yes, sir.

Q. Is that bank still doing business?

A. Yes. sir.

The WITNESS. Pardon me for interrupting. I give the Government a copy of the deposits, the amount and the dates.

The COURT. All right.

Q. You haven't got a copy of that with you?

A. I have given it to the Government and I have given them the privilege to go to the bank and investigate and also tell the president of the bank to give them the information. The men I give it to are here in court representing the Government.

The COURT. Anything else?

Mr. BESSON. No; I have nothing further.

Redirect Examination by Mr. KESSLER:

Q. When you came back from your wedding trip and Government inspectors came to see you about this matter you freely and fully gave them all the information you had about Mr. Rogers and all about this transaction?

392 A. Yes.

Q. About where you deposited the checks and everything you knew about it?

A. I told them everything.

Mr. KESSLER. That is our case so far as the boats are concerned.

Mr. BESSON. I would like to call attention to this fact that in the exceptions to the claim here the right of Mr. Kessler to file——

Mr. KESSLER. Let me ask the question of the witness where he is.

The COURT. Yes.

By Mr. KESSLER:

Q. Captain Mathiasen, did you retain the firm of Kessler & Kessler and Samuel I. Kessler to represent you in the proceedings in this court?

A. Yes.

Q. You authorized Samuel I. Kessler to sign the libel for you?

A. Yes.

Mr. BESSON. Objected to. His authorization is of no value.

Q. Did you on behalf of the corporation authorize me to do that which I heretofore asked you?

A. Yes, sir.

Mr. BESSON. Objected to again because unless the corporate existence is shown here and the powers of the president to make such an arrangement are shown that is null and of no effect.

Mr. KESSLER. That is argumentative.

Mr. BESSON. It is not. I don't know and the Court doesn't know yet whether there is such a corporation as the Matoil Service and Transport Company.

393 Mr. KESSLER. I think the Court knows it.

Mr. BESSON. The existence of the corporation has not been proven yet.

The COURT. Well, there has been some testimony, I think enough to warrant the assumption.

Mr. BESSON. This whole thing may be mere hocus pocus conjured up by these people to show an ownership in the boat, I mean unless there is some records here to show the existence of these corporations.

The COURT. Mr. Besson, there has been certainly evidence indicating the Government's knowledge of certain facts that this witness testified to. Now, the Government ought to be prepared to rebut that testimony by this time and if an untruth has been here testified to to show it.

Mr. KESSLER. It has not been raised in the exceptions——

Mr. BESSON. I submit——

The COURT. What was not raised?

Mr. KESSLER. That this is not a corporation.

Mr. BESSON. I don't have to prove the nonexistence. I think it is their duty to prove the corporation exists.

Mr. KESSLER. What is not raised is admitted. I don't think the prosecutor seriously contends this.

Mr. BESSON. I don't have to prove the corporation.

The COURT. The president of the corporation comes here and says, I am the president of the corporation, which is a Delaware corporation. I don't think he has to say here is a certificate of in-

394 corporation or bring up the records of the State of Delaware or whatever would be necessary to prove a record of that corporation first. I think that is prima facie proof of his position when he himself comes here and says so.

Mr. BESSON. I was just looking through the exceptions, the exceptive allegations which say that the claimant fails to allege that the Matoil Service and Transport Company is the true and bona fide owner of the—well, this refers to the cargo.

Mr. KESSLER. It is the same thing in the vessel. You don't raise the question.

Mr. BESSON. The second was that the claimant fails to allege that Samuel I. Kessler named as attorney is duly authorized to make the

claim and that the claimant has failed to file any stipulation for costs. I think that was corrected later by the filing of such a stipulation.

The COURT. Yes.

Mr. BESSON. And it was further objected that Samuel I. Kessler was not authorized to file the claim on behalf of the said alleged owner.

I submit, if the Court please, that there must be something shown here to indicate that this company actually did authorize Mr. Kessler to file the claim. We don't know except the two men whom the Court had never seen before came here and told a story about this Matoil Service and Transport Company. There are some singular things about the story told by Mathiasen, I mean about the manner of payment for the money for this charter party, the unusual generosity of Rogers in entering into this one-sided agreement, of
395 which a benefit amounting to about $3,500 a month was to pass practically to Mathiasen, who was the real stockholder in the company, the others being just employees in his office, and under those circumstances, and I think it would be incumbent on the issues raised in the exceptions to the claim or the exceptive allegation that it be shown that this corporation by some act, lawfully shown, it would have to be an act by its directors, shown on its minutes, authorized Mr. Kessler to act, or if the president had the power he had the power within the bylaws to perform a duty of this kind.

The COURT. What was your question, Mr. Kessler? Maybe the stenographer can find it?

Mr. KESSLER. I can repeat the question from my mind. The question is, did you on behalf of the corporation authorize me to act for the company and file these exceptions, to appear on the company's behalf and file the claim?

The COURT. And you object to it?

Mr. BESSON. I object to it as not the proper method of proof, that the president of the corporation has no power in the absence of proof of authority of such power to make such an authorization.

The COURT. I will allow him to answer the question. You may have an exception.

(Government's counsel prays an exception, which is hereby allowed and sealed accordingly.) (Sealed.)

By Mr. KESSLER:

Q. What is your answer to that, Captain Mathiasen?

A. What is it?

Q. Did you on behalf of the company authorize Samuel I. Kessler to appear in court in this matter and file a claim on behalf of the company?

396 A. Yes, sir.

Mr. BESSON. That is made subject to my objection.

The COURT. Yes, certainly.

Mr. KESSLER. That is all.

Mr. HALLE. On behalf of the cargo owner I have four or five witnesses here.

The COURT. I don't suppose we can possibly finish tonight.

Mr. HALLE. Impossible; because they are long witnesses.

(An adjournment was here taken until Wednesday, April 5th, at 10:30 A. M., at Trenton, N. J.)

Testimony continued from March 30, 1933, on final hearing.

Appearances as before.

Wednesday, April 5th, 1933.

Colloquy

Mr. KESSLER. May it please your Honor, the prosecutor raised some question of the incorporation of the Matoil Service and Transport Company, and while I don't think it is necessary, if there is any question to be raised, I desire to offer exemplified copy of the certificate of incorporation.

Mr. BESSON. I have brought here a copy, I suppose—you subpœnaed it, did you?

397 Mr. KESSLER. No; that is another matter. This is a certificate of incorporation.

Mr. BESSON. Oh. [Examines paper.]

Mr. KESSLER. I am offering this certificate, your Honor.

The COURT. There is no objection to the certificate, is there, Mr. Besson?

Mr. BESSON. No, sir.

(Paper received and marked Exhibit C–11.)

Mr. KESSLER. When Mr. Hughes was on the stand the other day he testified he had made daily reports of the work he had done on these ships, and that his first report was on July 19th. You remember that memorandum question came up?

The COURT. Yes.

Mr. KESSLER. There are probably one hundred or more of these reports [indicating folder].

The COURT. Do you want to put them in the record? They will be very expensive to print.

Mr. KESSLER. That is what I don't want to do. I offer them here for inspection of the prosecutor if he desires to see them, and perhaps I may put in the first one in the record, which is the 19th day of July 1932, and every succeeding day thereafter, and they are open for the inspection by the prosecutor if he desires to see them.

(Mr. Besson examines papers.)

Mr. KESSLER. Have you any objection to our offering the first sheet?

Mr. BESSON. Not at all.

Mr. KESSLER. I offer, sir, the first sheet, dated July 19, 1932,

398 the first report, and submit for the prosecutor's inspection every report thereafter from that day, ending the 21st day of September 1932.

(Paper received and marked Exhibit C–12.)

Mr. KESSLER. We subpœnaed the Collector of the Port of New York to produce certain documents. Is the Collector here?

Mr. BESSON. Mr. Wilson.

Mr. KESSLER. Mr. Wilson, please.

JAMES S. WILSON, called on behalf of the claimant, being duly sworn, testified as follows:

Direct examination by Mr. KESSLER:

Q. You are the Deputy Collector of the Port of New York?

A. No, sir.

Q. What is your official position?

A. Customs collector in charge of documentation of vessels.

Q. Coming from the Deputy Collector's office in New York?

A. Yes, sir.

Q. You have charge of the documents in the collector's office?

A. I have.

Q. Have you a record of having documents of ownership of certain boats of the Matoil Service and Transport Company?

A. Sir?

Q. Have you the record of having certain documents of the ownership of boats of the Matoil Service and Transport Company?

399 A. Name the vessels.

Q. "Evelyn", "Doris", and the "Helen"?

A. I have.

Q. Beg pardon?

A. I have.

Q. Will you produce them, please?

A. Do you want copies of the documents or the originals?

Q. Have you the originals?

A. The original documents; no. I have the original record.

Q. These are the copies on file with your office [indicating]?

A. No, sir; they are copies of the records of our office.

Q. Have you made them, are they the correct copies of the records?

A. Yes, sir; certified. I have the originals, also, if you want to see them.

Q. These are the enrollment licenses that you just produced to us?

A. Yes, sir.

Q. Of the three vessels?

A. Yes, sir.

Q. You had certain documents delivered to you by the Matoil Company upon which you issued these consolidated enrollment and licenses, did you not?

A. Yes, sir.

Q. Will you produce those records?

A. What records do you want?

Mr. KESSLER. May I state these are three copies of those which are already in evidence on the part of the Government, just produced by the witness.

The COURT. Yes.

Mr. KESSLER. And it is not necessary now to put them in?

400 The COURT. No.

Q. The builder's certificate, have you that?

A. I have. Certificate of incorporation of the Matoil.

Mr. KESSLER. Copy has already been offered. It is not necessary to offer it now.

Mr. BESSON. That is the copy that was offered as Exhibit C–11.

Q. That is a copy of the certificate [indicating]?

A. This is the original filed with the customs.

Q. This was filed with the customs office?

A. Yes, sir.

Mr. KESSLER. My we, instead of offering the one we have offered, have this one substituted?

Mr. BESSON. That is a Government record that belongs to the customs house.

The COURT. No, Mr. Kessler; use the one that you already have so as not to disturb original documents.

Mr. KESSLER. We have served an exact duplicate of the certificate which is filed; there is no question about that, is there?

Mr. BESSON. Not as far as I know.

Q. Have you the builder's certificate?

A. I have, sir.

Q. For each boat?

A. I have That is the whole records of the documentation.

Q. You have three documents of that kind?

A. I have.

Q. One for each boat?

A. I have.

Mr. KESSLER. We offer these documents in evidence.

401 The WITNESS. They are official records of the customs house.

Mr. KESSLER. They will be marked, inspected, and returned, I assume. That is the usual practice, is it not?

The COURT. Well, Mr. Wilson, you can make copies of those and supply them. You want to keep the originals in your office?

The WITNESS. I would like to keep the originals.

The COURT. You have forms of that kind you can make copies of?

The WITNESS. Yes.

The COURT. It will be stipulated between counsel that true copies of these papers will be substituted for the originals so that the originals may be retained by the collector.

The WITNESS. Thank you.

Mr. BESSON. Counsel suggests a brief abstract. I ask that copies of the originals be made.

The COURT. I think you are entitled to have the copies.

Mr. WEINBERGER. Only for the purpose of identifying what the subject matter is now.

Mr. KESSLER. I am coming to that.

The COURT. They can be marked in evidence. These can be marked in evidence with the stipulation as I have suggested that copies be substituted therefor.

Mr. KESSLER. We offer the documents on the said "Doris."

(Paper received and marked Exhibit C–13.)

402 Mr. KESSLER. I offer the documents on the boat "Evelyn."

(Paper received and marked Exhibit C–14.)

Mr. KESSLER. I offer the documents on the boat "Helen."

(Paper received and marked Exhibit C–15.)

Q. These three documents just exhibited are all alike in character except for the difference in name?

A. Difference in name, tonnage, dimensions.

Q. Except for the description of the boats they are all of like character?

A. Yes.

Q. I observe in Exhibit C–15 a master carpenter's certificate, and ask you what that is.

The COURT. I think you ought to show all the things that C–15 contains. You see, it is more than just the certificate.

Q. C–15 contains, first, I observe, Mr. Wilson, a card, which is a certificate of inspection, is it not, by one of the inspectors of the barge Helen?

A. Certifying that the official number, that the name, official number, and net tonnage are properly marked and home port is properly marked, certificate of customs office.

Q. The next page is the owner or mortgagee of vessel and an affidavit attached of the owner, is it not?

A. It is an affidavit of the president of the Matoil Service and Transport Company, a Delaware corporation, that 75 percent of the stock is owned and controlled by American citizens, under the provisions of Section 38 of the Merchant Marine Act, which provides that that must be so.

Q. And the paper attached to this Exhibit C–15 is the——

403 A. Is the builder's certificate signed by the builder?

Q. What does that indicate?

A. It indicates that it was built for the Matoil Service and Transport Company, of 15 Moore Street, her name, who built her, when and where, and the dimensions.

Q. That is in case of new boats that certificates meet the same requirement as a bill of sale?

A. That is the first requirement of a new vessel, production of a builder's certificate. On that is predicated measurement of the boat on application.

Q. That builder's certificate is, in a new vessel, is a substitute of a bill of sale in an old vessel, is it not; meets the same position?

A. Identify ownership; yes.

Q. The last paper attached to this exhibit——
A. Is the dimensions of the boat.
Q. The Government's certificate of the dimensions of the boat.
A. Right, sir.
The COURT. That applies to all three boats?
The WITNESS. It does, Your Honor.
Mr. KESSLER. We have no further questions.

Cross-examination by Mr. BESSON:

Mr. BESSON. I would like to ask him a couple of questions about those. I will use the one we have offered in evidence.

Q. I direct your attention here to exhibits G–1, 2, and 3; they are, respectively, the enrollment and license of the three vessels, "Evelyn", "Helen", and "Doris." Now, in the event that a vessel of that kind is chartered to or at least a charter party is executed the vessel is turned over to someone other than the owner, a new
404 crew takes charge of her, it is customary to note the change of the master on that, is it not?

Mr. KESSLER. Objected to, if Your Honor please. It is immaterial in this issue.

Mr. BESSON. I submit it is material, if the Court please, because a change of master must be noted, I contend, on the certificate.

The COURT. Well, of course, it may not be proper cross-examination, Mr. Besson, but if you want to make him your witness for that——

Mr. BESSON. Yes; I will make him my witness for that purpose. If you have other proof he can be withdrawn.

Mr. KESSLER. No. Well, I had rather you would put him on on your own case, as a matter of fact.

The COURT. What is the difference? Maybe he wants to go to New York.

Mr. KESSLER. Do you want him to go on as your own witness; are you through with him on cross-examination?

Mr. BESSON. I will go on with him as my own witness.

Direct examination by Mr. BESSON:

Mr. KESSLER. I object to that question.

The COURT. I will let him ask it. There has been some testimony as to the charter parties being executed.

Mr. KESSLER. I don't know of any such regulation, but assume it is correct, what has that to do with the ownership of this vessel?
405 They don't say we violated any law for which we are subject to any penalties. That may be something else.

The COURT. I don't know; there is not a jury here, and if it is irrelevant to the issue I will not consider it.

Mr. KESSLER. There is no reason for it. Let the prosecutor point out how it becomes relevant in this issue.

Mr. BESSON. It is relevant, if Your Honor please, because under section 252 it is provided that a registered vessel when transferred,

or, no, I will withdraw that statement. The rules applicable to registered vessels——

The COURT. Rules of what?

Mr. BESSON. The rules of the shipping act——

The COURT. Yes.

Mr. BESSON. Applicable to registered vessels are made applicable to enrolled vessels.

The COURT. All right.

Mr. BESSON. And under section 40 of title 46 in the Shipping Act, whenever there is a change of master there shall be an endorsement on the certificate of registry. Of course, that endorsement would be on the certificate of enrollment. I want to ask this witness, he having charge of these documents, how this notation was made.

The COURT. Was there any notation made?

Mr. BESSON. If it was made, I mean whether it was made, on the one that is in the custody of the owner of the vessel or whether it is made at the customs house or where it is made.

The WITNESS. Want me to answer that question?

406 The COURT. Yes. Go ahead.

Mr. KESSLER. I object to it, Your Honor.

A. When there is a change of master, the new master appears at the marine division of the custom house with the document. Entry is made in a book. He takes oath to the effect he is an American citizen and he is going on in lieu of the previous master. That is provided for, failure to have a change when a change occurs, there is a penalty of $10.

Q. Isn't there also a penalty that voids the enrollment?

A. Not that I know of, on an enrolled vessel. The specific statute that provides on a registered vessel $100 penalty but not on an enrolled, $100 penalty and the document becomes void.

Mr. BESSON. I will get the statute.

The COURT. All right.

Mr. KESSLER. What difference does it make, suppose it is ten, a hundred or a thousand-dollar penalty? What has that got to do with ownership? We may be subject to a penalty which Your Honor is not going to decide.

The COURT. That is right.

Mr. BESSON. It has to do, if Your Honor please, with the status of these people here.

The COURT. I will let you go on.

Mr. BESSON. With relation to the ownership of the vessel. They claim they own it.

Q. Now, is it the practice for a man to be the master of a vessel and still absent himself from it at the time it is in the hands of a changed crew under a charter party?

407 Mr. KESSLER. Objected to. What difference does it make what the practice is? This man is a holder of documents. He may not know the practice among masters.

The COURT. He has been with the Collector of the Port of New York since the "Time whereof the memory of man runneth not to the contrary."

Mr. KESSLER. He doesn't know what masters may do. They may leave their vessels in charge of somebody else. How does he know it? What difference does it make, anyway?

A. I can only quote the law on it. When there is a change of master a new one goes aboard a vessel—he must be an American citizen, have his name endorsed on the paper by appearing before a deputy collector and swear he is an American citizen, and that endorsement is made on the document and in our record books.

Q. There is no record in this case of any changing of master?

Mr. KESSLER. There is no evidence there was a change of master.

A. Allow me to see that [indicating]. If it doesn't appear on this document there was no change.

Q. And the provisions for the notation of such changes are made on the back of G–1, G–2, and G–3?

A. Provisions?

Q. In that part where it says "endorsements of change of master", is that right?

A. Provisions are made for changes of master.

Q. Yes. Blanks are provided for that purpose?

A. Yes.

Q. Did you have charge of that work in the collector's office?

A. I am in supervision——

408 The COURT. Those are original documents, aren't they, Mr. Besson?

Mr. BESSON. Yes.

The COURT. They fail to show any change of master. They speak for themselves in that respect.

Mr. KESSLER. Certainly.

Mr. BESSON. I think that is all.

Mr. KESSLER. That is all, sir; thank you.

The COURT. All right, Mr. Wilson.

Do you gentlemen want these original documents for anything else?

Mr. KESSLER. I don't think so; I think we have sufficiently identified them in the record for the moment.

The COURT. Mr. Wilson will supply you with copies of those papers to go in the record.

(To Mr. Wilson.) Send them directly to the clerk.

Re-direct examination by Mr. KESSLER:

Q. According to your records who are the owners of these three boats?

A. Matoil Service and Transport Company, Delaware corporation.

Q. Has there ever been any change of ownership in your records?

A. According to the record, no.

Mr. KESSLER. That is all.

The COURT. All right. Mr. Wilson.

409 THOMAS J. DURKIN, called on behalf of the claimant, being duly sworn, testified as follows:

Direct examination by Mr. KESSLER:

Q. You are connected with the United Dry Docks?
A. Yes, sir.
Q. Incorporated?
A. Yes, sir.
Q. What position do you hold with that company?
A. Cashier, New York office.
Q. Do you know Mr. Bates, do you?
A. Yes, sir.
Q. Do you know Mr. Hallock?
A. Yes, sir.
Q. Do you know——
The COURT. How long have you been secretary?
The WITNESS. Cashier.
The COURT. How long have you been cashier?
The WITNESS. Cashier for the United Dry Docks since its combination, consolidation, or merger; since February, 1929.
The COURT. All right.
Q. Do you know whether your company built ships for the Matoil Service and Transport Company?
A. They do, sir.
Q. What ships did they build for them?
A. They built motor barges, one propelled and two nonpropelled, the "Evelyn", the "Doris", and the "Helen."
Q. Do you know Mr. Bates' signature?
A. Yes, sir.
Q. I show you Exhibit C–1 and ask you if that is the signature of the vice president of your company [indicating]?
410 A. Yes, sir, that is Mr. Bates' signature.
Q. I show you Exhibit C–2 and ask you if that is his signature?
A. Yes.
Mr. BESSON. May I cross-examine the witness on that?
The COURT. Yes, surely.

Cross-examination by Mr. BESSON:

Q. How long have you known, Mr. Bates?
A. Directly I have known him before the merger, but I have been right in the——
Q. Where is Mr. Bates now, if you know?
A. Where is he now?
Q. Yes.
A. He is most likely at the office today.
Q. He is readily available?
A. Oh, yes. I am right in the same suite of offices with Mr. Bates.

Q. And you have seen Mr. Bates sign his name many times?

A. Many times as cashier he has signed thousands of checks in the last four years,

Q. You have seen him sign?

A. Sign any number of them; yes, sir.

Q. That signature on C–1 is the signature of George H. Bates [indicating]?

A. Yes.

Q. You know nothing about the document itself, do you?

A. Nothing about the document?

Q. C–1, you don't know anything about that paper?

A. Nothing in particular outside of what it refers to.

411 The COURT. You know whether the stationery is the official stationery of your company?

The WITNESS. Yes; it is the official stationery.

The COURT. All right.

Mr. BESSON. I have the objection that I don't understand why, under the circumstances, Mr. Bates, who knows all about the transaction, can identify the document——

Mr. KESSLER. Why don't you ask him why Bates isn't here?

Mr. BESSON. I don't think that is for me to explain.

Mr. KESSLER. All right, I will ask him.

The COURT. All right.

Direct examination by Mr. KESSLER:

Q. Why isn't Mr. Bates here today?

A. Today we are holding our annual stockholders' meeting at the offices and all the officers of the company are more or less required to be there.

Mr. KESSLER. We don't have to explain it but we are willing to explain the fact.

The COURT. You didn't have anything to do with the drawing of that receipt that is on the inside of C–1?

The WITNESS. No, sir.

The COURT. That would be in Mr. Bates' province.

The WITNESS. That would be in Mr. Bates' province.

Q. I show you Exhibit C–3 and ask you whether that is Mr. Bates' signature?

412 A. Yes, sir.

Q. Now, the United Dry Dock Company business is that of building vessels, is it not?

A. Yes.

Q. Among other things?

A. Yes, building new construction and marine repairs, ship repairs.

Q. Do you ever give a bill of sale for new construction?

Mr. BESSON. Objected to.

Mr. KESSLER. We have a right to show it; the prosecutor made such a point that we have not a bill of sale.

Mr. BESSON. They have offered an agreement in evidence that showed a bill of sale was to be delivered.

Mr. KESSLER. We still stand by that agreement.

The COURT. Yes.

Mr. BESSON. And that it was agreed upon in these particular transactions.

Mr. KESSLER. I will explain that.

Mr. BESSON. A bill of sale would be delivered. I don't see what difference what their custom may have on this transaction. What they did speaks for itself.

Mr. KESSLER. The collector himself says bills of sale are not necessary in new construction, and they take the builder's certificate in lieu of it.

By the COURT:

Q. Well, Mr. Durkin, did you have anything to do with this transaction at all that gives you any personal memory of it?

413 A. The transaction of the construction?

Q. Yes.

A. And payment of it?

Q. Yes.

A. Yes.

Q. You remember the transaction?

A. Yes, sir.

Q. You observe that C–1 is an unexecuted blank with the exception of the letterhead fastened to it?

A. Yes.

Q. Do you know why the blank was not actually executed?

A. Oh, it is a bill of sale.

Q. Yes.

A. The question is why a bill of sale——

Q. Why this was not filled out by the proper officer of the company and why simply a receipt as is attached to it was given, do you know?

A. Well, let me explain it in my own way, in this way.

Q. Yes.

A. These contracts were drawn and work as it progressed was paid for.

Q. Yes.

A. Therefore, by the time the boat was completed the boat was completely paid for and we had no title to it.

Mr. BESSON. I object to that and ask that be stricken out. It is a conclusion.

Mr. KESSLER. Not at all. It is not a conclusion, it is a fact.

The WITNESS. It is theirs.

Mr. BESSON. Counsel has offered——

The WITNESS. It is their property.

414 Mr. BESSON. In evidence three contracts for the construction of the boat and those contracts specify the terms.

Mr. KESSLER. What difference does it make? You cannot complain about that, if that contract was not delivered.

The COURT. Don't both talk at once.

Mr. BESSON. I submit they are offering testimony to contradict the terms of a written contract which they themselves have offered in evidence.

The COURT. No; I think it is to explain the absence of the execution of the bill of sale.

Q. In those cases you simply give a receipt of that kind, is that your practice?

A. That is the general practice; yes, sir.

Q. Such a receipt as is contained on the letterhead?

A. Yes.

The COURT. All right.

By Mr. KESSLER:

Q. And in addition to this receipt do you also deliver the builder's certificate to be filed with the collector?

A. Builder's certificate which is practically necessary.

Q. The law says it is actually necessary.

A. The law says it is actually necessary.

Q. And that is done in every case of new construction, is it not?

A. In all cases.

Q. And the builder's certificate indicates for whom it was built, does it not?

The COURT. That speaks for itself, Mr. Kessler.

Mr. KESSLER. You may examine.

415 Cross-examination by Mr. BESSON:

Q. How long have you been employed by the United Dry Docks Company?

A. Since February 1929. Previous to that with one of the other companies.

Q. Do you know Mr. Hughes?

A. Mr. Hughes?

Q. Yes.

A. No; I don't think I know Mr. Hughes.

Q. You never saw Mr. Hughes around the place?

A. Not in my place.

Q. Who represented——

Mr. KESSLER. Where is Mr. Hughes?

Mr. BESSON. Never mind.

Mr. KESSLER. You want to trick him?

Mr. BESSON. I don't want to trick anybody. I want to ask this witness.

Mr. KESSLER. He thinks he is probably an officer of this company.

Q. Do you know who represented the Matoil Service and Transport Company?

A. I don't know. In what respect?

Q. Did anyone for the company come to your drydock almost daily?

A. I am not at the drydock.

Q. Where are you?

A. At the office; in the executive office, 11 Broadway.

Q. So you are nowhere near the drydock?

A. The actual shipbuilding, no.

Q. Did you ever have any contact at all with a Mr. Hughes on behalf of the Matoil Service and Transport Company?

416 A. No; I met Captain Mathiasen, he was the only one I had any contact with.

Q. All your dealings were with him?

A. Yes, sir.

Redirect examination by Mr. KESSLER:

Q. In other words, you had to do with the office records and payments of money on account?

A. That is all.

Q. When you received money, from whom did you receive it in this case?

A. From whom?

Q. From whom; yes.

A. Captain Mathiasen.

Q. And these three boats were fully paid for by him?

A. Fully paid for.

Q. By him?

A. By Captain Mathiasen.

Mr. KESSLER. We have nothing further, your Honor, on the boats.

Mr. BESSON. Just one minute.

Recross-examination by Mr. BESSON:

Q. How do you know Captain Mathiasen paid for the boats?

A. How do I know he paid for them?

Q. Yes.

A. By our records.

Q. You yourself have no personal knowledge, have you?

A. I received the checks, I should say practically all the checks.

417 Q. You received the checks from him——

A. They came through my hands.

Q. You actually received the payments?

A. Yes.

Q. You know from that they are fully paid for?

A. Yes.

Redirect examination by Mr. KESSLER:

Q. You received this money from Captain Mathiasen on behalf of his company?

A. Matoil Service and Transport Company.

Mr. KESSLER. That is all, sir.

Mr. WEINBERGER. May we proceed with the other phase of the case?

The COURT. Yes.

JAMES R. WALSH, called on behalf of the claimant, being duly sworn, testified as follows:

Mr. KESSLER. May I suggest, the prosecutor has served on us notice to produce yesterday at 3:30 in the afternoon, asked us to produce certain minute books and so forth. We were unable to communicate with our client, he was not available, and we are unable to produce them on such short notice.

Mr. BESSON. I don't think that is unreasonable notice, the minutes of a corporation, of which the president is in court here today.

Mr. KESSLER. I didn't see him until I got to Trenton.

The COURT. Well, he hasn't got them; what are you going to do about it, Mr. Besson?

418 Mr. BESSON. I would ask the Court for a continuance to produce them.

The COURT. We will see.

Mr. BESSON. I think the man could get them very easily from his office, have someone bring them over here.

Mr. KESSLER. Suppose we don't want to produce them; what are you going to do about it?

Mr. BESSON. Subpœna them. These people are coming here, if the Court please, claiming ownership; they shouldn't act in a manner secretive and with any evident design to conceal from the Court.

Mr. KESSLER. The prosecutor has no justification for making statements of that kind. If he is going to try the case on that phase, he is not going to get very far. How can the minutes show anything so far as ownership is concerned? You can have them if you want them but we can't have them today for you.

The COURT. All right.

Direct examination by Mr. WEINBERGER:

Q. Captain Walsh, where do you live, sir?

A. 108 Van Wagonen Avenue, Jersey City.

Q. Have lived in Jersey how long, Captain?

A. Approximately three years.

Q. Are you familiar with Port Johnson, Bayonne?

A. Yes, sir.

Q. What interest, if any, have you with regard to the dock rights or privileges there?

A. I lease and operate the dock there from the Jersey Central Railroad.

Q. Have done that how long?

419 A. Three years.

Q. Do you know Mr. Rizzo, sitting at the table there [indicating]?

A. Yes, sir.

Q. And what business, if any, did you have with Mr. Rizzo with regard to giving him the privilege of using any part of your dock at Port Johnson?

A. Mr. Rizzo had charge of three boats down there, and paid the wharfage for them.

Q. What boats were they?

A. The "Doris," the "Helen," and the "Evelyn."

Q. Will you state to the Court when it was that he made the arrangement with you and what the terms of it were and when you received payment, if you will, please?

A. Mr. Rizzo did not himself make the arrangements for the boats to come in.

Q. Well, there was someone who made them first?

A. Yes.

Q. Who was that, sir?

A. Mr. Rogers.

Q. After Mr. Rogers had made the arrangements did you then meet Mr. Rizzo?

A. Yes, sir.

Q. The claimant in this cause?

A. Yes, sir.

Q. And what arrangements had you made with Rizzo which were made after your arrangements with Rogers?

A. Mr. Rogers said that Rizzo would take care of the boats and pay the wharfage.

Mr. BESSON. Object to what Rogers said.

The COURT. You cannot say what Rogers said.

Mr. WEINBERGER. I consent that be stricken out.

420 Q. I am only asking what Rizzo said to you.

Mr. BESSON: I object to what Rizzo said. He is here in the courtroom. What he did——

Mr. WEINBERGER. I am attempting now to show the arrangement that was made with the owner of the premises and I certainly have the right to do that, and I am going to follow it up by Rizzo taking the stand.

The COURT. All right.

Mr. WEINBERGER. It is corroborative of what I propose to show.

Q. Will you state what the arrangements were?

A. Mr. Rizzo was to pay one dollar a day for the "Helen," one dollar a day for the "Doris," and fifty cents a day for the "Evelyn," $2.50 a day for the three boats.

Q. When was this arrangement made?

A. On the twenty-third day of November.

Q. What year?

A. 193——

Q. 1932?

A. Yes.

Q. When did the boats come in?

A. On the twenty-third day.

Q. How long did they remain there?

A. They remained there until December 11, when they were seized, and I think removed on December 12 by the customs authorities.

Q. During the entire period of time from the 23d of November down to the date I take it of the seizure, which was made by the Government, is that the date you have in mind?

A. Yes, sir.

Q. Was there anyone in control of those boats other than Mr. Rizzo or his two watchmen?

421 Mr. BESSON. I object to that.

A. Well——

The COURT. Yes, it is, to say the least, leading.

Mr. BESSON. Not only is it leading, but it seems to me there is nothing upon which to justify such a question.

The COURT. No.

Mr. BESSON. This man is not omnipotent, he was not there day and night.

The COURT. The proper question is who was in charge of the boats during that time.

Mr. WEINBERGER. May I reframe it?

Q. Who was in charge of the boats, Captain, during that time?

A. Mr. Rizzo.

Q. Is he the claimant here at the table?

Mr. BESSON. I object to that.

Mr. WEINBERGER. I withdraw that. I don't want to irritate my friend this morning. I will withdraw the question.

Q. Is the gentleman in the court here who was in charge of the vessels?

A. Yes, sir.

Q. Will you point him out, please?

A. (Witness does as requested.)

Q. Is that the gentleman there [indicating]?

A. That is the gentleman.

Mr. WEINBERGER. May I have the record show he indicates the claimant?

The COURT. Yes; he indicates Mr. Rizzo, the claimant.

422 Cross-examination by Mr. BESSON:

Q. Do you know Agent Lynch?

A. Yes, sir.

Q. Agent Norwood?

A. Yes, sir.

Q. You had a conversation with them about the payment of the wharfage, didn't you?

A. Yes, sir.

Q. Isn't it a fact that you told both Lynch and Norwood that Rogers paid the wharfage?

A. Yes, sir.

Q. When did Rogers pay it?

A. Rogers paid me wharfage, I think, on the 22d day of November.

Q. I know, but these boats were seized on the 12th of December?

A. Yes, sir.

Q. Who paid the wharfage between the 22d of November and the 12th of December?

A. From the 23d of November until the seizure there Rizzo paid the wharfage.

Q. Isn't it a fact that you told Agents Norwood and Lynch that after the seizure Rogers called you on the phone and told you that he would see that the wharfage was paid in full if you remained neutral in this controversy between the Government and Rogers?

A. He did not say that.

Q. Did he call you on the phone?

A. He called——

Mr. WEINBERGER. One minute.

Q. If he didn't say that, what did he say?

Mr. WEINBERGER. Wait a second.

The COURT. Just a moment. Don't answer it.

423 Mr. BESSON. There is no objection but counsel rises and says, "one minute."

Mr. WEINBERGER. I object.

Mr. BESSON. Then I ask he state the grounds of his objection.

Mr. WEINBERGER. Don't you command me yet, you are only United States Attorney. When you sit up there you can command me.

Mr. BESSON. I am not addressing my remarks to counsel and I am addressing my remarks to the Court.

Mr. WEINBERGER. Now, now, Mr. Besson.

The COURT. Let the Court do the admonishing.

Mr. WEINBERGER. Yes. It is the Court that does that.

The COURT. All right.

Mr. WEINBERGER. My objection is, if your Honor please, that——

The COURT. Do you know the question?

Mr. WEINBERGER. Yes, sir.

The COURT. What was the question.

Mr. WEINBERGER. He started out, "What did Mr. Rogers say", then he goes on and says, "Did he say," and proceeds. There are two questions, both of them are objectionable, they are both hearsay, not binding on this individual, and what Rogers did or did not say to Captain Walsh is immaterial.

The COURT. That is quite true, Mr. Weinberger, but, as I understand the District Attorney, he asked him whether it was not a fact that he told the Government agents certain things.

424 Mr. WEINBERGER. And he answered no.

Mr. BESSON. If your Honor please, this is cross-examination, I am asking this witness a question which is designed to contradict, to lay a foundation for contradicting some statement which he has made here.

The COURT. You asked him whether he said certain things to these agents, Mr. Besson.

Mr. BESSON. Yes, sir.

The COURT. As I understand the witness, he says he did not say that.

Mr. WEINBERGER. That was his answer. That is as far as he can go.

Q. Did you have any conversation with Rogers after these boats had been seized by the Government?

Mr. WEINBERGER. One minute. That is objected to on the ground obviously it is hearsay. I don't care what his conversation was, we are not bound by it. That is fundamental.

Mr. BESSON. It has been established here Rogers was the man who chartered the boats.

Mr. WEINBERGER. True.

Mr. BESSON. By their own case, their own proofs.

Mr. WEINBERGER. True.

The COURT. Yes.

Mr. BESSON. It is not hearsay.

Mr. KESSLER. I want it clearly understood my case is closed. Nothing was established on this question of the cargo. I am not interested in the cargo.

The COURT. That is right.

425 Mr. KESSLER. Any testimony going into the case has no relation, your Honor is trying separate cases.

The COURT. I understand that.

Mr. KESSLER. It has not been established in our case at all.

Mr. WEINBERGER. I desire to have my objection noted for one reason. This is not cross-examination. If Mr. Besson desires to make the Captain his witness I forego the pleasure of all the direct examination he wants. I only asked him a few questions. They were, number one, did Rizzo make the arrangements from the 23d of November down to December 12th, what were the arrangements, and the cross-examination is limited to that excepting for the purpose of contradiction, and then the contradictory question must be put to the witness as to what they propose to ask him on that score, and the answer is binding on them one way or the other.

The COURT. All right. That is what has been done so far.

Mr. BESSON. Will you repeat the question, please?

(Question read.)

The COURT. I will let him answer that.

Mr. WEINBERGER. May I ask that be limited to a yes or no answer?

The COURT. Yes.

A. Yes.

Q. What was the conversation?

Mr. WEINBERGER. Objected to, for the reasons urged.

426 Mr. BESSON. If your Honor please, I submit there is no merit in the objection because there is evidence in this cause

before the Court indicating that Rogers was the charterer of these boats, in effect.

The COURT. Not in this cause, Mr. Besson.

Mr. BESSON. If your Honor please, these things are inseparable. You cannot separate the cargo from the boat. These things are inseparable to that extent because the operations of the cargo are so closely affiliated with the boat itself that the responsibility cannot be taken from the owner or the charterer of the boat, and I think, that is a principle of admiralty law.

Mr. WEINBERGER. There is a marked difference in the pleadings. The United States Attorney filed a separate pleading in each case, and the manner of defense is clearly set forth, and certainly he cannot inter-ally every admiralty case that comes in this court and say it is a part of this case.

Mr. BESSON. These cases have been tried together here for convenience, and too for the very reason so that we can accomplish that so that we won't have six separate trials and repeat all of this testimony.

The COURT. Yes; that is true, Mr. Besson, but you are asking him now on cross-examination what conversations he had with a man named Rogers, and I don't think that is proper cross-examination. You can ask him about a specific statement alleged to have been made, as you say, to these Government agents. Now, he says he didn't make that statement. I will let you ask him what statement he did make to those agents, if you want to.

427 Q. Will you answer then what statement he did make?

A. Yes, sir.

The COURT. That is proper cross-examination.

Mr. WEINBERGER. May I be heard on that?

The COURT. Yes.

Mr. WEINBERGER. I object to it on the ground whatever the statement may have been made, it is not proper cross, and secondly, if he desires him to make him his witness I yield to him.

The COURT. He has admitted he knows these agents and talked with them. Isn't it so, Mr. Witness?

The WITNESS. Yes, sir.

The COURT. He says he didn't make the statement that counsel had propounded.

Mr. WEINBERGER. What is the statement that was made?

The COURT. Yes.

Mr. WEINBERGER. Fundamentally the vice in the question, as I see it, is this. It calls for a conversation between this witness and another person who is not a party to the issue made in the absence, obviously, of Rizzo, and it would therefore clearly be hearsay, what the conversation was unless it was for a specific purpose of contradicing what he now says.

The COURT. Yes. He is laying a foundation to attack the credibility of this witness.

Mr. WEINBERGER. May I have my objection?

The COURT. Yes; you may have your objection and exception.

428 Mr. WEINBERGER. He objected to my asking conversations with Rogers. Now he wants to.

The COURT. That is right. He is not asking for the conversation between Rogers and himself.

Mr. WEINBERGER. I thought that was it.

The COURT. No; he is asking, he says to the witness, "Didn't you say to Agents Lynch and Norwood", so and so, and the witness says, "No; I didn't." Now; he says, "What did you say to Agents Lynch and Norwood?" Perfectly proper cross-examination in my humble opinion.

Mr. WEINBERGER. May I say ordinarily I would be inclined to agree with you if it was between the party to the proceedings, but when you speak of a party who is not a party to the cause and it is said in the absence of the party, certainly that cannot be material.

The COURT. He is not attempting to bind the claimant here. He is laying the foundation to attack the credibility of this witness, that is all.

Mr. WEINBERGER. He has done that by the question, didn't you say so and so, and the answer is no.

The COURT. He is not attacking it yet at all; he is simply laying a foundation for an attack, as I understand.

Mr. WEINBERGER. Let me put it another way to your Honor. This is really in effect rebuttal testimony; it must be; he must lay it for the purpose of contradiction. He can ask the witness a specific question, didn't you say so and so, answer yes or no, and then he brings the witness for the purpose of contradicting.

The COURT. That is right.

429 Mr. WEINBERGER. The minute he says, "What is the conversation", that is not and cannot be testimony for rebuttal purposes because it is in its nature direct testimony, and I think your Honor on reflection will agree with me. To me it looks fundamental.

The COURT. All right.

Mr. WEINBERGER. Credibility or otherwise would not make any difference.

The COURT. You may have an exception.

Mr. WEINBERGER. Exception.

Claimant's counsel prays an exception, which is hereby allowed and sealed accordingly.) (Sealed.)

Q. (Question read: "What was the conversation?")

The COURT. With these two Government agents.

A. Mr. Lynch and Mr. Norwood asked me who made arrangements for the wharfage at Port Johnson. I told them Mr. Rogers. They asked me who paid me and I said Mr. Rogers up to then. They asked me if there was anybody else. I said, "Yes; there was a short fellow with Mr. Rogers when he made arrangements for the wharfage."

Q. Now, when did you have this conversation with Lynch and with Norwood?

A. If I recall correctly, the day after the seizure on board of the tugboat "Paoli" at Port Johnson.

Q. So that up to that time the wharfage had been paid by Rogers?

A. Not up to that time.

Q. Up to what time?

A. The boats had been there previous to the twenty-third
430 day of November and they had come from the shipyard there and went away and came back in for the second time on the twenty-third day of November.

Q. When was the date that they came there the first time?

A. In September from the shipyard. I can't just remember the date.

Q. Well, now, you have records there at the dock, haven't you?

A. We do in some cases keep records and in other cases we do not——

Q. Now, isn't it a fact——

Mr. WEINBERGER. Had you finished the sentence?

The WITNESS. I am not finished.

Mr. WEINBERGER. Please let him finish.

A. If a boat comes in there on a day-by-day wharfage we check it in and check it out and charge it accordingly. If a boat comes in there on a monthly rental basis they take space and pay for it whether the boat is in or out. On these boats we keep no check or no record.

Q. Was this boat kept in there on a monthly rental basis or daily rental basis?

A. They came in on a monthly basis and then, if I understand the thing correctly, they pass to a, somebody else's hands because he said from the 23d on the wharfage would be taken care of by Rizzo, that he was finished with paying the wharfage.

Q. Well, did you tell Norwood and Lynch that at any time during this conversation with them that Rizzo had paid you wharfage?

A. They never asked me. I——

Q. Didn't they ask you who paid the wharfage?

431 A. I told them the last wharfage was not paid and hadn't been paid until practically two weeks after the seizure.

Q. Then, as a matter of fact, you were not paid the last wharfage from November 23d, until after the seizure and then by Rizzo?

A. No, we were—the wharfage was paid from the 23d to the first of the month. We get our wharfage semimonthly, on the first and 16th. We took up to the last month on the 15th. Rizzo paid the wharfage up to the first of December. From the first to the 11th of December there was no bill due until the 15th. The seizure occurred on the 11th, the boats were taken away on the 12th.

Q. On the 12th, wasn't it?

A. I wanted to know who was going to pay for that and Rizzo said, "I will take care of it." But it was, I should say, about the week after the 12th he took care of it.

Q. Did you hear from Rogers in the meantime?

A. Yes, sir.

Q. And about the wharfage?

A. Yes, sir.

Q. Was Rizzo with Rogers?

A. No, sir; it was a telephone call.

Q. Did you receive a letter from Rogers?

A. Not about wharfage.

Q. Have you got the letter with you?

A. No, sir.

Mr. WEINBERGER. Is that proper cross-examination, if Your Honor please? I am giving the United States Attorney much latitude but I object to that.

The WITNESS. I don't mind.

Mr. WEINBERGER. I know you don't mind but I want to finish this case sometime.

432 Q. Have you seen or heard of Rogers since that time?

Mr. WEINBERGER. Objected to.

The COURT. I will let him ask it.

Q. (Question read.)

A. No; not since the telephone call.

Q. Will you describe Rogers as you knew him?

A. Yes; he is a tall man, I should say, about six foot one, very heavy, he has got a pronounced straightness in his shoulders (indicating), and he wears glasses, and he has got slightly gray hair. He is a man you can easily identify.

Q. Do you know where he lives?

A. I do not.

Q. Where did you first meet Rogers?

A. At the dock at Port Johnson.

Q. Where did you first meet Rizzo?

A. On the dock at Port Johnson.

Q. Did you ever meet Rizzo before that time?

A. No, sir.

Q. Did Rizzo give you any address to which you could send bills or communicate with him?

A. He did give me an address but I didn't mark it down because he said, "I will be on the dock every day while the boats are here."

Q. As a matter of fact, these boats were in and out from the month of November, between Novemhber 13th and November 30th, almost every day, weren't they?

A. No, sir.

Q. You know a Mr. Sheridan, don't you?

A. Yes, sir.

Q. What is his position?

A. I beg pardon?

Q. What is his position?

A. Superintendent of the dock.

433 Q. You are subordinate to him, aren't you?

A. No; he works for me.

Q. He is subordinate to you?

A. Yes.

Q. Does Mr. Sheridan keep any records of the vessels that are at the dock?

A. When arrangements were made for wharfage I notified Mr. Sheridan of the arrangements and give him instructions how to handle it.

Q. Then he keeps records of the vessels coming in and out?

A. If it was one of the boats we keep records for.

Q. Take the "Evelyn", for instance, would you say the "Evelyn", only went out once and came in once between November 13th and December 12th?

A. I wouldn't even say it went out once, because, as I said before, she was there on a wharfage basis and paid whether she was in or out, and we kept no record of when she came in and out.

Q. Do you keep any record of the cargoes of these vessels?

A. Yes; we do.

Q. How?

A. We ask if they are loaded or unloaded and what they have aboard.

Q. And did any of these boats or were any of these three vessels loaded or unloaded while at the wharf at Port Johnson?

A. Well, there was one loaded and two apparently light.

Q. That was the time of the seizure?

A. Yes.

Q. Did you ever see a load taken off of these vessels?

Mr. WEINBERGER. One minute. I think, sir, this is not proper cross-examination.

434 The COURT. This is pretty far afield, Mr. Besson.

Mr. BESSON. If your Honor please, here is a man that says he was at these docks all the time, and that he knows everything that went on there, that these docks were operated under his supervision.

The WITNESS. Your Honor——

Mr. BESSON. Now, we have shown the Court here a set of affairs indicating that a loaded vessel and two unloaded vessels, containing alcohol were at the docks. Now, I think it is fair to ask this man what he knows about those vessels and about their condition, if he knows anything. I mean, that is I think fairly before the Court.

Mr. WEINBERGER. If your Honor please——

The COURT. Yes; but they produce him as a witness, they ask him a set of questions that confines you, under ordinary circumstances, to a limited cross-examination. If you want to bring out things about the dock that he is supposed to know as part of your case, that is one thing, then he is your witness.

Mr. BESSON. If your Honor please, I respectfully submit that where a certain state of affairs is shown with respect to the testimony of a witness, that I am permitted to cross-examine on matters relevant to that. I mean for the purpose of discovering to what extent the witness is familiar with the state of affairs he has described.

The COURT. What is your last question?

Mr. BESSON. He has come in here and says he is the man that operates and runs these docks. Now, am I to be precluded
435 from asking him what he knows about the docks, what he knows about the vessels that are at the docks.

The COURT. I don't think there is any objection to that.

Mr. WEINBERGER. I didn't think I was objecting to that.

Mr. BESSON. I think counsel is objecting.

The COURT. What was the question?

(Question read as follows: "Did you ever see a load taken off of these vessels?")

Mr. WEINBERGER. Who ever said there was a load on them? My friend has a load on his mind this morning.

Mr. BESSON. I object to counsel's remarks and I ask counsel be reprimanded for making these offensive remarks from time to time.

Mr. WEINBERGER. The responsibilities of his office naturally load his mind.

Mr. BESSON. He asks for the saving of time. He would save a lot of time if he would keep his mouth shut.

Mr. WEINBERGER. I object to the question on the ground I don't see how the load has anything to do with cross-examination. There is no evidence on direct. It was not broached, it was not discussed, and it is not proper cross.

The COURT. I think I will permit the question. He asks whether he saw a load taken from the vessels at the any time. You can answer that, whether you saw it; did you see it, yes or no?

The WITNESS. No.

Q. How many men are employed about this dock?

A. Five.

436 Q. What are their names?

A. Captain Foote, on part time.

Q. Captain Foote?

A. Yes.

Q. How do you spell that?

A. F-o-o-t-e.

Q. And who else?

A. And Horace Foote. They work occasionally. And Mr. Sheridan, Mr. Nacy, and Frank Walsh on full time. That is five men.

Q. In his conversation with you at any time, did Rizzo state or suggest any connection with Rogers?

A. Except the day before Thanksgiving he said, "Did Mr. Rogers tell you that I would take care of the wharfage?" I said, "Yes." "Well", he said, "from now look to me for the money."

Q. Did Rogers tell you that Rizzo was the watchman?

A. No; he didn't say watchman. He said Mr. Rizzo would take over these boats.

Q. Who was the master?

A. I don't know.

Q. Of the "Evelyn"?

A. I don't know.

Q. During all the time that you were at the wharf there you never saw the master of the "Evelyn"?

A. We never asked who is the master of a boat. We are only interested in who is in charge of the boat when it comes in and who is in charge when it goes out. As a matter of fact, there is quite a few people registered——

Q. Isn't the master the man in charge of the boat?

A. No; the man in charge of the boat is not necessarily the master. The people we recognize as the master is the people that is registered in the customhouse as master. We never go over there to find out unless we have some occasion to.

437 Q. What inquiry did you make about the nature of the cargo?

A. To us those three boats was just the same as any of the other thirty-six at the dock.

Q. You saw a red flag on the boat—wasn't there a red flag on the boat?

A. Anybody with common sense would know they were tankers, oil tankers.

Q. You have stated before that you kept a record of the loads of the boats?

A. I did not state I had any records of the loads of these boats. I distinctly stated two was light and one was loaded.

Q. You assumed from the appearance of the boats that they were loaded with oil, is that right?

Mr. WEINBERGER. No; he said there were two light and one loaded.

Mr. BESSON. He said anybody would know they were oil tankers, anybody would know.

Mr. WEINBERGER. Tankers, not that they were loaded with oil.

The COURT. That is right.

A. They were oil tankers.

The COURT. He says anybody would know they were tankers, but he didn't say he assumed they were loaded with oil.

Q. You saw the red flags on them; did you know why they had red flags on them?

A. Yes.

Q. Why?

Mr. WEINBERGER. I object to that. Is his mental operation binding on us?

The COURT. No; but a red flag has a definite significance.

438 Mr. WEINBERGER. Some of them have. To me a red flag——

Mr. BESSON. Here is a man captain of a wharf and obviously

the presence of a red flag would indicate some kind of danger. Here is apparently a boat with a dangerous cargo wharfed in there for a dollar a day, for two boats, and fifty cents for another, a great fire risk put in there for $2.50 a day.

The COURT. It is a matter of argument, isn't it?

Mr. WEINBERGER. I will withdraw the objection. I want to know what the red flag is.

The COURT. Right.

Q. When you saw the red flag on each of these vessels did you make any inquiry to discover the nature of the cargo?

A. No. I had two others down there with red flags on besides those three. I had the "Martha E." and the "Whales", they both had red flags on.

The COURT. What does the red flag indicate?

The WITNESS. It indicates explosives or inflammable cargo.

Q. Now, when a cargo is inflammable was any difference made in the wharfage charge?

A. Yes; if it was just a casual customer. If it was a steady customer we try to keep our trade and base our rates accordingly.

Q. What would be the difference in the wharfage charge for an inflammable cargo and a noninflammable cargo?

A. We would not make any difference unless it was a stranger coming in for overnight or something like that.

439 Q. It made a difference in your insurance rate?

A. It didn't make a difference in the insurance rate down there because it has all been cancelled two years ago.

Q. So that there was none at all?

A. There was no insurance there.

Q. And it would not have made a great deal of difference if the place had burned up; is that right?

Mr. WEINBERGER. I object.

A. Not to me.

Mr. WEINBERGER. There ought to be a limit. I want my friend not to say I am stopping him.

The COURT. All right. I will stop him.

Mr. WEINBERGER. Thank you for helping me out, your Honor.

The COURT. All right.

Q. Did you ever have any conversation with Rizzo about his interest in these vessels?

A. Yes, I did.

Q. What?

A. Well, Mr. Rizzo claimed to own the vessels.

Q. He didn't tell you he was the watchman?

A. He said, "They are my boats."

Q. That was the way he put it?

A. That was approximately what he said.

Q. "They are my boats."

A. Yes.

Q. How was Rizzo dressed?
A. Pretty swanky generally.
Q. Did you go aboard the vessels with Rizzo?
A. Oh, yes, I went aboard them several times.
Q. Did Rogers introduce you to Rizzo?
A. Rogers introduced me to Rizzo.
Q. Did Rogers go on the vessels with you and Rizzo?
440 A. No, he never left the dock. He would stay there and just look from the dock.
Mr. WEINBERGER. Just a couple of questions, Captain Walsh.

Redirect examination by Mr. WEINBERGER:

Q. Have you ever been in the service of the Government?
A. Yes, sir.
Q. In what capacity?
A. Every capacity from the rate of an enlisted man up to an officer, from the period of 1909 to 1920.
Q. Officers mean different officers. Can you tell us just what station so that we will know?
A. Yes, my last rating was a lieutenant, junior grade.
Q. What particular line of work?
A. Salvage and piloting and mine-laying and mine-sweeping.
Q. I think you did say, did you not, that Mr. Rizzo had paid you for the amount of wharfage due from the 23d of December down to the 1st?
A. Yes.
Q. And the unpaid portion that he still owed you was from the first down to the 15th?
A. The 15th.
Q. The seizure having interrupted——
A. Yes.
Q. The day of payment?
A. Yes.
Q. You have since been paid, however, by him?
A. Yes, sir.
Q. You did refer to the fact that Mr. Sheridan was in your employ, that Mr. Nacy was in your employ, and Mr. Frank Walsh; is that correct?
441 A. Yes, sir.
Q. I don't know whether you had a chance to fully answer, but I want it to appear on the record how many vessels were there at the time of this seizure?
A. Approximately thirty-six boats.
Q. Red flags indicate oil or gasoline or anything of that character, do they not?
A. Any explosive cargo or inflammable.
Mr. WEINBERGER. That is all, Captain.

JOHN SHERIDAN, called on behalf of the claimant, being duly sworn, testified as follows:

Direct examination by Mr. WEINBERGER:

Q. Mr. Sheridan, you are employed by Captain Walsh?
A. Yes, sir.
Q. You know Mr. Rizzo, the gentleman in court here?
A. Yes; I have seen him.
Q. Were you familiar with the vessels, "Evelyn", "Doris", and "Helen"?
A. Yes.
Q. Do you recall the boats coming in there, do you recall when Mr. Rizzo came in there with those boats as owner?
A. The last time?
Q. Yes.
A. Yes; generally, just before Thanksgiving.
Q. From the time, by the way, was it the day before Thanksgiving?
A. I think it was; I am not positive.
Q. From that day until the day of the seizure——
A. Yes.
442 Q. Who was in charge of those boats?
A. Mr. Rizzo.
Mr. WEINBERGER. Your witness.

Cross-examination by Mr. BESSON:

Q. Are you a seafaring man, seaman?
A. Well, inland waters.
Q. Have you ever held a master's rating?
A. No, sir.
Q. How long have you lived in Bayonne?
A. About two years.
Q. Two years.
A. I have been there off and on about four years; I think three or four years.
Q. You never had any naval service, did you?
A. No, sir.
Q. Did you keep any books or records?
A. Yes; I kept memorandum of the boats on wharfage at Port Johnson.
Q. You provided such a memorandum to Government agents, did you not?
A. I didn't provide any memorandum. I gave them some information.
Q. Now, you gave them information as to the activities of the motor screw "Evelyn", didn't you?
A. I believe I did.
Q. You keep that in a book, don't you?
A. Yes, sir.

Q. Now, as a matter of fact, between November 13th and December 12th the "Evelyn" was in and out of that dock many times, wasn't it?

A. Well, I should say about six times.

Q. Can you recall from memory the times that it was in and out?

A. No, sir.

443 Mr. WEINBERGER. May we formally object? Unless counsel desires to make him their witness I don't think it is proper cross-examination. We would like to have it appear this examination should be limited to the direct in its entirety.

The COURT. All right. I will let him ask the question.

Mr. BESSON. I think it is a fair cross-examination.

The COURT. All right. I will let you ask the question, Mr. Besson.

Mr. BESSON. Sir?

Mr. WEINBERGER. I think he answered it. It was an objection in anticipation of more bad ones, your Honor.

The COURT. All right.

Q. Were you present at these docks on December 12, 1932?

A. Yes, sir.

Q. At the time of the seizure?

A. Yes, sir.

Q. Of these vessels, the "Doris", the "Evelyn", and the "Helen"?

A. Yes, sir.

Q. Did you live at the docks?

A. Yes, sir.

Q. You slept there?

A. Yes, sir.

Q. Had quarters there?

A. Yes, sir.

Q. Had you ever seen any of these three boats unloaded at the docks?

A. No, sir.

Q. Would you say that they had never been unloaded at the docks?

444 Mr. WEINBERGER. I object. He said he never saw them.

The COURT. Yes.

Q. To your knowledge, had they ever been unloaded at the dock?

A. No, sir.

Mr. WEINBERGER. He has answered that.

The COURT. Well, he said no.

Q. Did you know what the cargo of the vessels was on December 12th?

A. No, sir.

Q. You knew they had red flags on?

A. Yes, sir.

Q. How far were these three vessels moored from the place where you slept?

A. About, oh, perhaps forty feet.
Q. What was this place in which you slept?
A. It was a tugboat, "Paoli."
Mr. WEINBERGER. "Paoli"?
The WITNESS. Yes.
Mr. WEINBERGER. Thank you.
Q. Was the "Paoli" permanently moored in this dock?
A. Yes, sir.
Q. It was out of service?
A. Yes, sir.
Q. Did you see Rizzo around there?
A. Yes, sir.
Q. When, for the first time?
A. I don't recollect the first time I saw him. He was around there generally, I mean every day.
Q. Do you remember any other man that you saw in connection with these three boats or on the boats?
A. Oh, yes; I saw about three or four more.
445 Q. Do you know their names?
A. I do not.
Q. Did you see Rogers? Do you know Rogers?
A. No, I don't know Rogers. I never saw him.
Q. Who was the master of the motor oil screw "Evelyn"?
A. I don't know. I don't know his name.
Q. You saw him there?
A. I have seen him.
Q. Would you say it was this man [indicating Captain Mathiasen]?
A. No, sir.
Q. It was not he?
A. No, sir.
Q. It had a different master?
A. Yes, sir.
Mr. WEINBERGER. Of course that is not cross.
Q. Will you describe the appearance of the man?
A. Well, he was a rather tall man, gray hair, of fair complexion, rather heavily built, I should say.
Mr. BESSON. That is all.
The COURT. Anything else?

Redirect examination by Mr. WEINBERGER:

Q. Do you know whether the man was a master or a pilot?
A. I don't know.
Mr. WEINBERGER. That is all.

446 EDWARD F. NACY, called on behalf of the claimant, being duly sworn, testified as follows:

Direct examination by Mr. WEINBERGER:

Q. Where do you live, Mr. Nacy?

A. Port Johnson Coal Docks, Bayonne, New Jersey.

Q. How long have you lived there in Bayonne?

A. Oh, about three years.

Q. Were you employed by Captain Walsh on the 23d of November down to December the 12th?

A. Yes, sir.

Q. 1932?

A. Yes, sir.

Q. Do you know Mr. Frank Rizzo, the gentleman seated there at counsel table [indicating]?

A. Yes, sir.

Q. Did you know there were three boats there called the "Evelyn", "Doris", and "Helen"?

A. Yes, sir.

Q. And during that time from the 23d of November until December 12th, who was in charge of those boats as owner?

A. Mr. Rizzo.

Mr. BESSON. I object to the question.

Mr. WEINBERGER. I will withdraw the words "as owner."

Q. Who was in charge of those boats?

A. Mr. Rizzo.

Mr. WEINBERGER: Your witness.

Cross-examination by Mr. BESSON:

Q. How long have you been employed at Port Johnson?

447 A. Oh, about three years.

Q. How old are you?

A. How old am I?

Q. Yes.

A. Oh, twenty-two years old.

Q. Born in this country?

A. Yes, sir.

Q. How did you become acquainted with Rizzo?

A. How did I become acquainted with him?

Q. Yes.

A. Well, I saw him at the dock.

Q. I mean how did you know his name was Rizzo?

A. Well, I heard the boss say, "That is Mr. Rizzo."

Q. That is the only way that you knew?

A. Yes, sir.

Q. How did you know that he had any interest in those boats?

Mr. WEINBERGER. I asked a question, he objected to it and struck it out, and now he says he had an interest.

Mr. BESSON. He said he was in charge of the boats.

The COURT. Well, ask him, how do you know he was in charge of the boats.

Mr. WEINBERGER. Yes.

Mr. BESSON. May I have the record repeated as to just what that question and answer were, I mean where the word owner was stricken out.

Mr. WEINBERGER. I will withdraw the objection. Let us get down to anything the United States Attorney wants. I will withdraw it, Mr. Besson.

Q. How did you know this man Rizzo had any interest in the boats?

448 A. All I know is, that Mr. Walsh, the boss, said, "This is Mr. Rizzo, who is in charge of the boats." That is all I know.

Q. When did he say that?

A. Well, I don't recall the day he said it.

Q. Did you ever see Mr. Rogers there?

A. No, sir. I don't know him.

Q. Don't know Rogers at all?

A. Never saw him.

Q. Did you ever see the master of the "Evelyn" there?

A. Well, I seen a man on there but I don't know——

Q. Who was sailing the boat, who was operating the "Evelyn"?

A. I don't know.

Q. You never saw Rizzo operate the "Evelyn," did you?

A. No, sir.

Q. You never saw him do any work about either of the barges, did you?

A. No, sir.

Q. Who was the man that operated the "Evelyn", do you know?

A. I don't know.

Q. Did you see anyone operate it?

A. I didn't see nobody operate it; no.

Q. How did the boats come into the dock?

A. They come in by the engine, of course.

Q. Wasn't there somebody on the boat steering it?

A. Why, certainly there was.

Q. Didn't you see the man in the pilot house?

A. I seen him, but I told you, I don't know his name.

Q. Can you describe the man that you saw?

449 A. He was tall and he had gray hair and he was kind of thin. That is all I know.

Q. You see Captain Mathiasen here?

A. Yes, sir.

Q. Was he the man?

A. No; never saw him down there, never.

Q. You never saw Captain Mathiasen there at all; did you?

A. No, sir.

Q. What were your duties around this wharf?

A. Well, I had to put in planks in the dock and fix the water lines down there and pump out the boats and keep them afloat.

Q. What boats did you pump out?

A. Oh, the "Troy" and "Muskenetcong."

Q. What are they, a couple of ferryboats?

A. No; they are coal barges operated on the coast and they are tied up now. We keep them afloat.

Q. Did you take any part in unloading cargoes from the "Doris", "Evelyn", and "Helen"?

A. No, sir; had nothing whatsoever to do.

Q. Did you ever see anyone unload the cargoes from these boats?

A. Didn't see nothing unloaded.

Q. How much of your time did you spend at these docks?

A. I was on the dock all day, but I had no time to watch the "Evelyn." I got work to do down there. I was up at the end of the dock putting in planks, fixing water pipes, and pumping out.

Q. Cautious all that time not to watch the "Evelyn?"

Mr. WEINBERGER. I object.

The COURT. The objection is sustained.

Q. How many days between the 23rd of November or rather the 13th of November and the 12th of December 1932, were you at that dock?

450 Mr. WEINBERGER. One minute. 23d was the date first.

Mr. BESSON. I will withdraw that. I changed it to November 13th.

Mr. WEINBERGER. It should be the 23d.

A. How many days was I on the dock?

Q. How many days from November 13, 1932, to December 12, 1932, were you at that dock?

Mr. WEINBERGER. The objection is made, I guess Mr. Besson inadvertently says 13, it should be the 23d.

Mr. BESSON. It is the question I am framing.

The COURT. He says he was there three years. You are trying to fix whether he was there during these particular days.

Mr. WEINBERGER. All right. The days are the 23d, not the 13th. I don't like number 13, anyway.

The COURT. The boats were there before the 23d, under different auspices according to the testimony.

Mr. WEINBERGER. They had gone out.

The COURT. Yes.

Q. How many days were you at the dock between November 13, 1932, and December 12, 1932?

A. I was there every day.

Q. Did you sleep there?

A. Yes, sir.

Q. Where did you sleep?

A. Tug "Paoli."

Q. Was that fixed up as a kind of a living place?

A. Yes, sir.

Q. You cooked your meals aboard the tug?

451 A. Yes, sir.

Q. How many men live aboard the "Paoli"?

A. Three.
Q. Sheridan, yourself, and who else?
A. Walsh, Frank Walsh.
Q. Is he any relation to the captain?
A. I don't know.
Q. Now, so that you were at the wharf day and night?
A. Yes; only I might probably went to the store or something for a few minutes but practically day and night.
Q. And during all the time you were there you never saw any cargo either put aboard or taken from the "Evelyn" "Ruth"—"Evelyn", "Doris", and "Helen"?
A. No, sir; never seen anything taken from them.
Q. Nothing taken from them?
A. Nothing at all, whatsoever.
Q. How many times did you see the man who was operating or the men who were operating the "Evelyn"?
A. Well, every time they come in, I guess.
Q. What sort of a cap did the master of the "Evelyn" wear?
A. What?
Q. What sort of a cap?
A. What sort of a cap?
Q. Yes.
A. He didn't have no cap on at all when I seen him.
Q. He simply was operating the boat from the pilot house?
A. Yes.
Q. How many were in the crew, if you know, of the "Evelyn"?
A. I don't know how many was in the crew.
452 Q. Was there more than one?
A. I don't know. I just seen him, I didn't notice anybody else.
Q. You mean to say these three boats were operated by one man?
A. I didn't say nothing of the kind. I said that is all I saw. I didn't say how many was on there.
Q. When these boats—you have seen the boats come in, haven't you?
A. Yes; I seen them come in once, that is all.
Q. When they came into the wharf there were operated by one man that you saw?
A. That I saw, but I don't know how many more. Lots of times there might be ten men on a boat, you only see one, the rest of them might be in the engine room.
Q. Do you mean to say one man could bring those three boats in and wharf them?
A. I didn't say that.
Mr. WEINBERGER. There is no evidence of that.
The COURT. He said he didn't say it.
Mr. WEINBERGER. Counsel assumes the most——
The COURT. He didn't say it.

Mr. WEINBERGER. The facts assumed are awful, if Your Honor please.

Q. Now, you have stated before, as I understood, that you saw the "Evelyn" and the "Doris" and the "Helen" come in to the wharf and tie up?

A. Yes, sir.

Q. When that happened how many men did you see engaged in doing that?

A. On the "Evelyn" I seen one man and then I seen two more on the barges. Mr. Rizzo was on the barges when they came in Thanksgiving, the day before Thanksgiving, but I wouldn't know their names.

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Q. How was Rizzo dressed when the barges came in?

A. He was dressed nice, dressed up pretty nice.

Q. He was not dressed like a seaman, was he?

A. No; he had good clothes on.

Q. Which barge was he on?

A. I don't just remember. I couldn't say.

Q. What part of the barge was he on that you saw him on?

A. What part of the barge?

Q. Yes.

A. Oh, he was on the deck, that is all, deck of the barge.

Q. Now, when they came in that was the day before Thanksgiving, were they loaded or unloaded?

A. Two of them was light, I think.

Q. Two of them were light?

A. I think so.

Q. And one was loaded?

A. Yes.

Q. Which was loaded?

A. I don't know, I think it was the "Doris", I am not sure, though, couldn't say for sure.

Q. Then they got into the dock and they laid there and when did they go out again?

A. They never went out after that, never.

Q. You remember when Thanksgiving was, don't you?

A. Why, certainly.

Q. Do you testify that these barges never went out after Thanksgiving Day?

A. I never saw them go out after that day.

Mr. BESSON. That is all.

Mr. WEINBERGER. That is all.

454 The COURT. Just a minute.

By the COURT:

Q. Did you see Mr. Rizzo very often after Thanksgiving Day?

A. After Thanksgiving Day?

Q. Yes.

A. Well, Mr. Rizzo, he used to be down there every day.
Q. Every day?
A. Yes, sir.
Q. What time of day?
A. He was there all day long.
Q. What did he do?
A. We didn't see him do anything. I didn't watch him, to tell you the truth, I had work to do, I was doing work.
Q. You knew he was there all day long?
A. Yes; he was there all day, but it was none, I never took notice of what they were doing. I went about the work we were doing, we had a lot of work to do down there.
Q. Anybody with Mr. Rizzo?
A. I never seen anybody with him.
Q. You haven't any idea what he did there all day long except that he was there?
A. No; I don't know what he did.
Mr. WEINBERGER. That is all.

455 FRANK A. WALSH, called on behalf of the claimant, being duly sworn, testified as follows:

Direct examination by Mr. WEINBERGER:

Q. Mr. Walsh, where do you live?
A. Port Johnson Coal Dock.
Q. I notice your name is Walsh; are you related to the captain at all?
A. Yes, I am a relative of his.
Q. What is that?
A. I am a relative of his.
Q. What relation?
A. I am cousin.
Q. Cousin of the captain?
A. Yes.
Q. Did you work for Captain Walsh?
A. Yes, about three years.
Q. Did you work for him between the 23d of November and December 12, 1932?
A. Yes, sir; every day.
Q. Do you know Mr. Frank Rizzo?
A. Yes. I see him down there every day.
Q. Did you see him between the 12th of December and November 23d, and December the 12th?
A. Yes, sir.
Q. In that interval of time who was in charge of the boats "Evelyn", "Doris", and "Helen"?
A. Mr. Rizzo was the man that I saw when I went over there. I went over and borrowed some gasoline off of him, a gasoline can one day.
Q. He was in charge?

A. He was the gentleman on the boat.
Q. Was he dressed like a gentleman?
The COURT. Dressed how?
Mr. WEINBERGER. As a gentleman. Someone "swanky." I meant to ask him what that was.
456 The COURT. That speaks for itself, too.
A. Yes, he was dressed pretty nice.

Cross-examination by Mr. BESSON:

Q. You worked around these docks, didn't you?
A. Yes, sir.
Q. How long did you work there?
A. About two years this last time and a year previous to that.
Q. You also live on this tug boat the "Paoli"?
A. Yes, sir.
Q. You were there night and day?
A. Yes, sir.
Q. What were your wages?
A. My wages?
Q. Yes.
A. Twenty-five dollars a week.
Q. Who paid you?
A. Captain Walsh.
Q. Were you employed by the Central Railroad?
A. No, sir; I was employed by the Central Railroad a long time ago, taking mail off a barge in New York.
Q. You were employed——
A. Now, I am working——
Q. By Captain Walsh?
A. Yes; he is paying me.
Q. Working for him?
A. Yes, sir.
Q. Did you ever see the "Doris", "Evelyn", and "Helen" come in and wharf?
A. I never seen them come in, but I saw them laying on the dock there. I was on the boats several times.
Q. Who was the master in charge?
A. The master in charge, I don't know, I didn't see them come in.
457 Q. Ever see them go out?
A. Never see them go out.
Q. Did you ever see them unload cargo?
A. No; I never did.
Q. You spent all your time around there, didn't you?
A. That is right.
Q. Both day and night?
A. Not night and day. After supper nights I went down street. I don't stay on the dock.
Q. What time did you come home usually?

A. Oh, midnight, sometimes.
Q. How often did you see Rizzo there?
A. I saw him every day.
Q. He would spend all his time there?
A. All his time.
Q. What would he be doing?
A. Well, he would be from one boat to the other, he would be traveling all around there.
Q. Just jumping back and forth from one boat to another?
A. I see two other fellows down there, I don't know who they were.
Q. Who was the other fellow?
A. I don't know who they were.
Q. Do you know Rogers?
A. No; I don't know Rogers.
Q. Did you see Rizzo doing any work around this place?
A. Well, I seen him doing work a couple of times but not much, picking up a rope or something like that [laughing].
Q. Who unloaded the boats?
A. I don't know.

Mr. WEINBERGER. No one said they were loaded yet.

458 The COURT. That is like saying "When did you stop beating your wife and why?"

Mr. WEINBERGER. And the word "load" is bad when you are doing that, too, sir.

The COURT. All right, I am agreeing with you, Mr. Weinberger.

Q. What was the first day that you saw Rizzo at the boats?
A. I can't remember. It is quite a while ago when the boats first came in.
Q. You do remember that Rizzo was always well dressed?
A. When the boats first come in there were two other parties on the boats, it was not Rizzo, someone else, I don't know who they were. I never had no dealings with them.
Q. When you first saw Rizzo he was well dressed, wasn't he?
A. He was dressed up; yes, sir.
Q. To get back to Rizzo, I mean he was not wearing clothes that a man would ordinarily do laboring work in?
A. No; not the kind that I was wearing.
Q. He was always well dressed?
A. Fairly well dressed, yes, as you see him now most of the time.
Q. After you first got acquainted with him, that was sometime in November, wasn't it?
A. When the boats first came in before Thanksgiving, yes.
Q. You would see him there every day?
A. That is right.
Q. At the dock. Spend the entire day there?
A. Yes, sir.
Q. Take the first day that you saw him there; what was he doing that day?

459 A. I think he was sitting down.

Q. Spent the day sitting down?

A. No; he was sitting down in one of the cabins, I think it was the "Helen."

Q. The weather was pretty cold, wasn't it?

A. It was not cold in there; he had an oil stove; he had an oil stove in there.

Q. He had what?

A. A little oil stove.

Q. He was sitting in the cabin?

A. Yes.

Q. You went in there and visited him?

A. Yes; I went in and talked to him for a few minutes.

Q. What were your duties around this place?

A. I had to help Mr. Sheridan.

Q. What were your duties around this place?

A. Him and I and Nacy sometimes used to go down and pump out boats, have a couple of old tugs quite a lot of water in them, used to pump the tugs out and I don't know about every other week a pipe used to break down there, it is not buried, it lays on top of the dock. We always found a lot to do.

Q. In between times you visited around a little bit?

A. There was not very many in between. We were always working.

Q. This first day you were there and saw Rizzo you visted him in his cabin, how much time did you spend there?

A. Spent probably half an hour there.

Q. Did Rizzo make any statement as to what he was doing there to you?

A. No, he didn't; he asked me what I was doing.

Q. Didn't tell you what he was doing on the boat?

A. No; he asked me what I was doing. I told him.

Q. Which boat was that?

460 A. I believe it was the "Helen."

Q. You didn't see him on the "Evelyn" at any time, did you?

A. No.

Q. Never saw him in the cabin of the "Evelyn"?

A. I seen him on the "Evelyn", the "Doris", and the "Helen", I have seen him on all of them; yes, sir, different times.

Q. In the different cabins?

A. Yes; I seen him go in the "Evelyn" and eat.

Q. Who did the cooking for him?

A. I don't know whether the other fellow cooked or whether he cooked. I used to see——

Q. They had a regular cook on the "Evelyn"?

A. I don't know, I never et nothing there. I cook myself on the "Paoli."

Q. Who else did you see on the "Evelyn" beside the man that did the cooking?

A. Well, I seen two other fellows.

Q. What?

A. I saw two other fellows, one was kind of an oldish fellow and the other fellow seemed to be younger, but I never talked with them at all, never had no conversation.

Q. Which one of them was the master, do you know?

A. I didn't know which one of them was the master. In fact, he never——

Q. Did you see Captain Mathiasen there?

A. No; I never saw Captain Mathiasen aboard the boats.

Q. At any time?

A. At any time; no, sir.

Mr. KESSLER. Does the prosecutor intend to prove Captain Mathiasen was there? If he doesn't it is unfair to put into the
461 record this continuous question. I represent him and I resent it. There is not any proof in it. He has no right to make such an inference. If he doesn't prove it he ought to say so.

The COURT. The man said he didn't see him there, so what harm does it do?

Q. Did you ever see on any of the days that you saw Rizzo about the boats, did you see Rizzo doing any work?

A. No; I couldn't say I did see him doing any work. I went over one day and borrowed some gasoline off him; I run short; I was pumping out a little tug. I borrowed a can full of gas from him and went back later on and give it back to him, that is all.

Q. Did Rizzo ever tell you what he was doing there?

A. Yes; he did.

Q. What did he say?

A. Told me the boats were carrying gasoline. That is why I went after the gas.

Q. What did he say his connection was with the carrying of gasoline by the boats?

A. He didn't have no conversation about his boats with me at all whatsoever. He asked me what I was doing and I told him I was working on the dock.

Q. He didn't tell you anything about the boats?

A. Absolutely nothing, nothing at all.

Mr. BESSON. That is all.

Mr. WEINBERGER. That is all, Mr. Walsh, Mr. Rizzo.

462 FRANK RIZZO, called on behalf of the claimant, being duly sworn, testified as follows:

Direct examination by Mr. WEINBERGER:

Q. Mr. Rizzo, you are the claimant in this case?

A. Yes, sir.

Q. Of the cargo which was——.

The COURT. Speak up, please.

Q. Which was on the vessel, the "Doris"?

A. Yes, sir.

Q. And did you have charge of the "Helen" and the "Doris" and the "Evelyn" between the 23d of November and the 12th of December?

A. Yes, sir.

Q. Were you the owner of the cargo on the date of the seizure made by the Government?

A. Yes, sir.

Mr. WEINBERGER. Your witness.

Cross-examination by Mr. BESSON:

Q. Where do you reside?

A. 43 East Thirty-sixth Street.

Q. Where; in Bayonne?

A. Bayonne.

Q. Did you give to anyone in the Government service an address of 243 Avenue A, Bayonne?

A. Yes, sir.

Q. Why did you give that address?

A. Well, I didn't want the police hanging around my house day and night.

Q. That was a vacant lot, was it not?

A. I don't know.

Q. You don't know what it was?

463 A. No.

Q. To whom did you give that address?

A. I just don't remember which officer I gave that address to.

Q. But the address you have now given us, 43 East Thirty-sixth Street, Bayonne, N. J., is where you actually live?

A. Yes, sir.

Q. How long have you lived there?

A. About a year and a half.

Q. And have you any family?

A. No, sir.

Q. What is this, a boarding house?

A. Well, it is a private family and I have a room there.

Q. You have a room there. What is the name of the family?

A. Di Rosa.

Q. How old are you, Mr. Rizzo?

A. Thirty-three.

Q. Where did you live before you went to Bayonne?

A. Lived in New York City.

Q. Do you know a Mr. George Rogers?

A. Yes, sir.

Q. How long have you known him?

A. About a year or a year and a half or so, I just don't remember how long.

Q. Do you know Captain Mathiasen?

A. No, sir.

Q. What is your occupation?

A. I am a seaman.

Q. Do you hold a master's rating of any kind?

A. No, sir.

Q. What is your rating as a seaman?

A. A seaman, an A B seaman.

Q. Have you got a certificate with you?

464 A. No, sir.

Q. Have you a certificate?

A. No, sir.

Q. Where did you get the rating of an A B seaman?

A. Never had the rating, didn't need it on the boats that I was on.

Q. You simply declared yourself to be one?

A. That is it.

Q. On what boats have you served?

A. I worked on the lighter "Rudolph Brothers", I worked on the tugboat "Neptuna", I worked on the lighter "Randolph Brothers."

Q. Have you ever had any business but that of a seaman?

A. No, sir.

Q. How did you become the owner of this cargo of the "Evelyn"?

A. I took over the charter and bought what was on deck and below decks.

Q. For how much?

A. Twenty-six thousand dollars.

Q. When did you take over the charter of the "Evelyn"?

A. Pardon?

Q. When did you take over the charter of the "Evelyn"?

A. At Mr. Rogers' office.

Q. Have you got a copy of the document by which you took over the charter?

A. I believe my lawyer has it.

Mr. BESSON. I ask that that be produced and marked for identification.

Mr. WEINBERGER. May I say to your Honor, Mr. Halle had possession of them and gave them to my associate, Mr. Margolis,

465 and apparently the envelope which he gave him was left at the office. We are just phoning for them now.

Mr. KESSLER. Those are the documents that were here last week and marked for identification.

The COURT. Yes. That was probably the mysterious writing on the backs of the documents.

Mr. KESSLER. That is right.

Mr. WEINBERGER. Since Mr. Margolis was here he has been sick and away and I don't know about the envelope. It was left in the office. It will be down here.

Q. When did this transaction take place?

Mr. WEINBERGER. May I formally object, if the Court please, on the ground that formally I think this witness is not obligated or obliged to answer these questions.

The COURT. Oh, yes; I think so, Mr. Weinberger, he has got to answer everything about the ownership. It is wide open. He says he is the owner. He can be cross-examined on the ownership.

Mr. WEINBERGER. I may be inclined to go a little distance with your Honor but may I, for the purpose of the record, say I do not believe the rule is such unless immunity is extended to the witness under the laws——

Mr. BESSON. The witness has voluntarily offered himself.

The COURT. Yes; he has not asked for any immunity, has he?

Mr. WEINBERGER. No. I am suggesting it now because I think legally he does not have to answer the question. I object.

466 The COURT. That is his province, if he wants to refuse to answer them.

Mr. BESSON. If your Honor please, this witness has come before the Court and offered himself.

The COURT. Now, Mr. Besson, I am ruling with you. You and I have worked together and you know you must not argue with the Court that is ruling with you.

Mr. WEINBERGER. I am trying to convince the Court the ruling ought to be with me, sir.

The COURT. Yes.

Q. (Question read.)

A. I refuse to answer on the ground it may incriminate me.

Mr. BESSON. This is an astonishing situation.

The COURT. No, it is not at all, Mr. Besson, that is perfectly all right. He may do that but of course the effect on the Court is something that you can argue afterward.

Q. Where did you get the $26,000 which you say you paid for this cargo?

Mr. WEINBERGER. Object to the fact, he didn't say he paid $26,000.

The COURT. Yes, he did.

Mr. WEINBERGER. He agreed to pay, your Honor.

The COURT. I understod him to say he paid $26,000.

Mr. WEINBERGER. I think he said agreed to pay. May I withdraw my objection on that? The question is erroneously stated as to a fact but I will withdraw the objection.

467 Q. Where did you get the $26,000 which you say you paid for the cargo?

A. I didn't have $26,000, I didn't pay $26,000.

Q. You paid nothing for it?

A. Oh, yes; I paid $5,000.

Q. Five thousand down?
A. Yes.
Q. To whom did you pay it?
A. To Mr. Rogers.
Q. Where did you pay it?
A. At his office.
Q. On Broadway?
A. No.
Q. Where was his office?
A. On Hudson Street.
Q. What address?
A. I believe it was 13 and 19 Hudson Street.
Q. When were you put in possession of this alcohol, that is the cargo of alcohol?
A. I refuse to answer on the ground it may incriminate me.
Q. Who was the master of the "Evelyn" at the time you were put in possession of the alcohol?
A. I refuse to answer on the ground that it may incriminate me.
Q. The master of the "Evelyn" at the time you were put in possession of the alcohol was not Captain Mathiasen, was it?
Mr. WEINBERGER. I object to it on the ground he is assuming it was alcohol. The witness has not said it was alcohol.
Mr. BESSON. He has claimed the alcohol.
The COURT. Of course, he has.
Mr. BESSON. In his claim that has been interposed in this case he stated that he claimed this alcohol. I think that is most ridiculous.
468 Mr. WEINBERGER. It says cargo, I think. That makes no difference, the witness has not said that now. So far as I am concerned the question as framed assumes an erroneous question of fact which has not been proven or established by this witness.
The COURT. I will permit him to answer the question.
Mr. BESSON. Sir?
The COURT. I will permit the question.
Mr. BESSON. Will you repeat the question?
(Question read as follows: "The master of the 'Evelyn' at the time you were put in possession of the alcohol was not Captain Mathiasen, was it?")
A. No, sir.
Q. Do you know who the master was?
A. No, sir.
Q. Can you describe the man?
A. Well, I can describe him. He was about five foot eight or ten, thin fellow, gray hair.
Q. Was he in your employ?
A. No, sir.
Q. On what day did you purchase the alcohol on the "Evelyn"?
A. I refuse to answer on the ground that it may incriminate me.

Mr. WEINBERGER. May I say to the Court I want to go on record here if counsel said he would give this witness immunity I waive what obviously is his constitutional privilege, but I don't think it proper to interrogate a witness on matters which may subject him to criminal prosecution unless there is such a waiver. That is what the law says, as a matter of fact.

469 The COURT. What is that?

Mr. WEINBERGER. The Prohibition Act, that a man may be compelled to testify and if the United States Attorney would give him the immunity he is entitled to under the statute——

The COURT. What has the prohibition law got to do with this?

Mr. WEINBERGER. I am speaking of the laws that are applicable to this particular subject matter now involved when I say prohibition, that is the limitation.

The COURT. What are you objecting to?

Mr. WEINBERGER. My point is this, that the questions asked by the United States Attorney obviously are questions of a nature and character which are such as would subject the witness to criminal prosecution, and he properly stands on his constitutional prerogative. I am willing, on behalf of the witness to waive those, the legality of those questions, providing the immunity is accorded him, I am willing to waive it and advise the witness to wave those legal rights that he has, so that the Court may have the entire picture of this entire controversy, but the United States Attorney should go on record one way or the other. He has no right to ask an incriminatory question and expect an answer.

Mr. BESSON. It is a rather astonishing situation, if the Court please. The claimant is put on the stand and offers to give certain testimony and then in matters really relevant on cross-examination refuses to answer certain questions. I have no authority in this particular case to give immunity to this witness. There is

470 a provision in the National Prohibition Act for violations concerned with that act, providing expressly for the giving of immunity, but this man is not an involuntary witness, he is a voluntary witness, he has come here before the Court as a voluntary witness, gone on the stand and made certain statements, then when he comes to certain parts of his cross-examination refuses to testify.

Mr. WEINBERGER. Answering the United States Attorney a witness is never voluntary, when he becomes a witness he is cloaked with the safeguards accorded him by the law.

The COURT. What are the safeguards accorded this man?

Mr. WEINBERGER. That he is entitled to immunity if there is to be any question asked of him which would subject him to criminal prosecution. Now, his dealings with other people may subject him to the crime or prosecution for the crime of a conspiracy to violate certain laws, and certainly this man is entitled to be protected from such prosecution. Here we are, we will win this case and be handed a couple more bouquets, and that is the reason I urge it.

I say to your Honor now the barrier is down if immunity is accorded him. There is nothing in the nature of this transaction which we won't give the Court.

The COURT. Of course, there is not. Why shouldn't he? You present a perfect "Heads I win, tails you lose" proposition to the Government.

Mr. WEINBERGER. Oh, no, your Honor.

The COURT. Yes, you do.

471 Mr. WEINBERGER. You can't do that with the Government; they always give us that; we never give them that, if the Court please.

The COURT. As I see the situation, here is a claimant who comes into this court and says certain of my goods have been taken by the Government illegally. Now, I have either erroneously or rightly ruled that before you can question the Government seizure you have got to be the owner. The claimant comes here and takes the stand and says "I am the owner." He is subject to cross-examination. He can't say to the Government, "You have got to give me immunity before you cross-examine." He has a right to sit here as he does and say, "I won't answer those questions because they may incriminate me, the answers may incriminate me."

Mr. WEINBERGER. True, but I am giving the Government the examination. He may have the bars down in the examination providing they give us immunity.

The COURT. The Government does not see fit to accept your R. S. V. P.

Mr. WEINBERGER. I want it noted that we offer it, if the Court please. In the language of the Court it is an R. S. V. P.

The COURT. All right.

Q. Then you are unwilling to state to the Court from whom you purchased the cargo of alcohol on the "Evelyn"?

The COURT. No; I won't permit that.

Mr. WEINBERGER. He said from Mr. Rogers.

Q. Bought it from Mr. Rogers, you bought it from Mr. Rogers; is that right?

472 A. Bought what?

Q. The alcohol?

A. No, sir. I bought the charters and the cargo below decks and everything above deck from Mr. Rogers.

Q. And the price agreed upon was $26,000?

A. Yes, sir.

Q. You made an initial payment of $5,000?

A. That is right.

Q. Where did you get the $5,000?

A. I had $1,500 of my own and I loaned the rest.

Q. From whom did you borrow?

A. I borrowed a thousand dollars from Harry Goldberg, I borrowed $1,500 from Tony Lombardo and a thousand dollars from Sam Calamano.

Q. Where do these three men live?
A. I don't know.
Q. How do you know their names?
A. I met them often enough, have met them often enough, rather.
Q. When did you borrow this money?
A. About the 21st of November.
Q. Was that the day that you made the first payment for the cargo?
A. No, sir.
Q. What?
A. No, sir. The 22d.
Q. Did you know what was in the cargo below decks?
A. I refuse to answer on the ground it may incriminate me.
Q. The cargo that you purchased was on all three of these vessels, was it not?
A. Everything that was on any of the three vessels or below deck.
Q. At the time you made this purchase were they all loaded?
473 A. No, sir.
Q. Which ones were loaded?
A. The "Doris" was supposed to be the only one that was loaded.
Q. Now, I direct your attention here——
Mr. BESSON. And ask that this be marked for identification, this paper taken from the file of the court in this case.
(Paper marked G–6 for identification.)
Q. And direct your attention to this signature, Frank Rizzo, is that your signature [indicating]?
A. Yes, sir.
Q. Did you read that document before you signed it?
A. I refuse to answer on the ground it may incriminate me.
Q. You mean to say——
The COURT. That is all right. He refused to answer.
Mr. WEINBERGER. Answer that question.
The COURT. No; just a moment.
Mr. WEINBERGER. May I advise the witness to answer the question?
The COURT. No.
Mr. BESSON. I object to that.
The COURT. Let the witness testify. If you have an objection to the answer——
Mr. WEINBERGER. May I ask the witness, advise the witness at this time?
The COURT. No; you may not advise a witness during the course of his examination, Mr. Weinberger; you are too good a lawyer even to ask the Court to do that.
474 Mr. WEINBERGER. May I, if the Court please, respectfully submit that I have I think a perfect right?
The COURT. Do you want to strike out the answer as not being responsive to the question?
Mr. WEINBERGER. What I had in mind was, I think it is a prerogative of counsel for a witness in this case, a claimant to say he may

not because of a legal error on his part under an erroneous view of the law on his part through your Honor suggest to him that he should answer that question.

The COURT. No; I won't. There may be something, I don't know what is in that paper, I don't know what is in his mind, there may be something in there in that paper that causes him to make that answer and I had much rather he stand on his rights as he sees them. He has apparently been advised as to his rights, has exercised his prerogative in that respect on a number of occasions, up to this point, and I think he probably can take care of himself much better than the Court can.

Mr. WEINBERGER. May I suggest the rule of law, as I understand it is that the Court should in all cases determine by its judgment whether a witness justifiably refuses to answer a question upon a legal ground of incrimination?

The COURT. Yes.

Mr. WEINBERGER. It is not for the witness to say and I think this question and his answer would clearly indicate that this is not such a question as he can refuse to answer on that ground.

May I respectfully urge the Court because of the law and because of what I regard the legal obligation of the Court, may I ask
475 the Court direct the witness to answer the question because legally it must be answered?

The COURT. Oh yes, Mr. Weinberger, that is true under ordinary circumstances, but here is a situation that is most delicate. Here is a man claiming, admittedly, a lot of contraband. Do you think I as the Court want to put him in a position where he might answer something that would incriminate him afterwards? I am in agreement with him that he may assert his rights wherever he thinks that they should be asserted, and in this instance after looking at the paper (to the witness) you read it; did you not?

The WITNESS. I didn't read it just now, I only looked at the signature.

The COURT. Well, counsel asked you to look at the paper.

The WITNESS. He asked me if that was my signature.

The COURT. Go back to the point where counsel presented the paper to him and see what happened.

(Question and answers read as follows:

"Direct your attention to that signature Frank Rizzo, is that your signature [indicating]? A. Yes, sir. Q. Did you read that document before you signed it? A. I refuse to answer on the ground it may incriminate me. Q. Do you mean to say——")

The COURT. Well, there you are.

Mr. BESSON. I don't know what counsel is about to do now, but I am conducting an examination, and I object to his show-
476 ing—I see him approaching the witness with this paper marked for identification.

Mr. WEINBERGER. May I apologize for my approach, your Honor?

The COURT. Oh, yes.

Mr. WEINBERGER. I think I will sit down. I beg your pardon, Mr. Besson.

Q. It has been testified that you were seen coming in on one of these vessels, that is, one of these three vessels at the time they were coming into the wharf; is that true?

A. Yes, sir.

Q. Then you, as a matter of fact, took trips aboard the vessels; did you not?

A. Oh, no. I only came in that once.

Q. Now, it has been testified that you spent your time in this dock yard at Port Johnson almost daily from before the——

The COURT. Quite daily, I think.

Q. Before Thanksgiving or daily before Thanksgiving, 1932, and to include December 12, 1932; is that true?

A. Not all my time. I would come down for an hour or two and hang around and then go off and maybe come back in the afternoon and hang around a half an hour or an hour.

Q. Were you doing any work at that time, you had no employment?

A. No.

Q. What were you living on?

A. I would play a little cards, play some horses. I managed to scrape by.

Q. How much room rent were you paying at that time?

A. $5 a week.

477 Q. Well, you had taken all the available money you had and invested it in this cargo?

A. Yes, sir.

Q. When you invested this $1,500, as you state, to which you added the money borrowed from the three men you have already named, how much money did you have left?

A. I had very little left.

Q. So that from that time on you were obliged to eke out a living by playing cards and making bets on horse racing?

A. No; I still had $500 in my pocket.

Q. That you carried about with you?

A. Yes.

Q. Then, as a matter of fact, you had no trouble at all about living during that time?

A. (No response.)

Q. After you took over these three vessels, whom did you have as the master of the "Evelyn"?

A. There was no master.

Q. Whom did you have to operate the vessel?

A. I only had two watchmen. There were no men to operate the vessel.

Q. You took over the charter, you say?

A. Yes.

Q. You were sailing into the wharf with the vessels?

A. Yes.

Q. And that happened once. Who was operating the vessels when that took place?

A. I had agreed with Mr. Rogers that his men would bring the boats down to Port Johnson and then leave.

Q. At the time that that vessel came in who was the master of the vessel that brought it into Port Johnson?

478 A. How should I know? I never saw the man before and never saw him after.

Q. Where did you get on these vessels first?

A. At Nyack.

Q. Was Rogers there when you went aboard the vessels?

A. Yes.

Q. So that the transaction took place, the transfer of the cargo below decks and above decks took place up at Nyack?

A. No; the transfer took place at the office, but I took possession at Nyack.

Q. When you got on the vessels at Nyack, what date was that, if you remember?

A. That was the 22d, late at night.

Q. The 22d of November?

A. Yes.

Q. 1932?

A. That is right.

Q. What hour of the night?

A. About nine or ten o'clock.

Q. What was the condition of the vessels at that time, loaded or unloaded?

A. One was loaded and two were light.

Q. Did you make any examination of the contents of these vessels before you purchased them?

A. I refuse to answer on the ground that it may incriminate me.

Q. What was your purpose in buying the cargo of two unloaded vessels?

A. I was; I had to take the charter of the three vessels in order to take the cargo of the "Doris."

Q. You made no examination of the contents of the vessels at the time you were up there at Nyack, did you?

A. I refuse to answer on the ground that it may incriminate me.

497 Q. Did you have any conversation with any of these men aboard the boats at that time?

A. No.

Q. Did you explain your presence on the boat to any of them?

A. Mr. Rogers explained it.

Q. I see. Did he introduce you to the master of the vessel, of the "Evelyn"?

A. No; he told me, 'this man here, Frank, is going to go down with you boys, take you down to Port Johnson, and then leave."

Q. And that man, how many other men were there?

A. Three men.

Q. The man operating the "Evelyn" and two other men?

A. That is right.

Q. Now, when these vessels were being operated, how many men remained aboard the "Evelyn"?

A. When they were being operated?

Q. Yes. Was there just one man operating the "Evelyn"?

A. Certainly.

Q. Running the boat and taking care of the lines and everything else?

A. There were two other men there and me when we came down.

Q. How were these two barges handled, were they lashed together or brought down——

A. No; they were tied together and then towed down by the "Evelyn."

Q. Wasn't there anybody aboard those barges to watch the lines?

A. There was four of us there.

Q. What did you do?

A. Just took a joy ride.

480 Q. I know, but what part in the operation of these barges and the "Evelyn" did you take?

A. I didn't have to take any part.

Q. You were just dressed up, well dressed, not dressed as a seaman and really enjoyed the trip?

A. That is right.

Q. And then after that these men that you say were there, left and you never saw them again?

A. That is right.

Q. Would you say that after that time on the 22d of November these three vessels never left the yard at Port Johnson?

A. That is right.

Q. They were kept there all the time?

A. That is right.

Q. Would you say you were there during all that time watching these vessels and they were in your control?

A. No; I didn't say I was watching them. I had two men to watch them.

Q. Who were the two men you had to watch them?

A. I had Frank Townsend and I had Pete Riley.

Q. Are those two fellows in court?

A. No, sir.

Q. Were they sailors?

A. Yes, sir.

Q. Now, on the 26th of November did the "Evelyn" leave the yard at Port Johnson and go away for half a day?

A. No, sir.

Q. On the 28th of November did the "Evelyn" leave the yard at Port Johnson and go away for half a day?

A. No, sir.

Q. On the 6th of December, did the "Evelyn" leave the yard at Port Johnson and go away for half a day?

481 A. No, sir.

Q. On the 9th of December, did the "Evelyn" leave the yard at Port Johnson?

A. No, sir.

Q. And go away for half a day?

A. No, sir.

Q. Was the "Evelyn" away from the yard at Port Johnson during the 10th of December?

A. No, sir.

Q. So you would say between the 22d of November, 1932, and the 12th of December at no time did the "Evelyn" leave the yard?

A. That is right.

Q. All that time it was in the hands of Pete Riley, and what is the other fellow?

A. Frank Townsend.

Q. When these boats were seized on December 12, 1932, neither of these two men were there?

A. No, sir.

Q. Isn't it a fact that you told——

Mr. Besson. Stand up, Mr. Pernisco.

(A man in the courtroom arose.)

Q. You have seen Mr. Pernisco, have you not, the man who just entered the courtroom?

A. Yes, sir.

Q. Isn't it a fact on the night of the seizure, December 12, 1932, you told him that you were just a watchman aboard these vessels.

A. That is right.

Q. That is true, isn't it?

A. Yes, sir.

Q. And you told him that Mr. Rogers was the owner, didn't you.

A. Yes, sir.

Q. Have you ever seen Mr. Rogers since you paid him the $5,000?

482 A. No, sir.

Q. Have you tried to find him?

A. Yes, I have tried hard.

Q. You went over to his office?

A. That is right.

Q. Looking for him?

A. That is right.

Q. Did you see Captain Mathiasen there looking for him, too?

A. I don't remember seeing Captain Mathiasen.

Q. Captain Mathiasen said he saw a man who looked like you there.

A. It is possible. There was several people besides me looking for him.

Q. How many times did you go to look for him?

A. Oh, I went about five or six times in the following two weeks.

Q. Whose suggestion was it that you buy this cargo of the three vessels from Rogers?

A. Mr. Rogers suggested it to me.

Q. What, if anything, did he say to you at the time that he made the suggestion?

A. Said he had a good buy, that he had something he wanted to get rid of in a hurry.

Q. Did you tell Pernisco that this cargo was inflammable?

A. Yes, sir.

Q. Did you put up the red flags on the vessels?

A. No, the men I had—the flags were up when I got the charter and took the boats over.

A. Oh, and they were in that condition when they were towed down?

A. Yes, sir.

Q. Now, this money that you, this $1,500 that you paid over to Rogers along with the balance of the $5,000 that you borrowed
483 from these men you have named, was that a fund that you carried about in your pockets?

Mr. WEINBERGER. May I have that question?

(Question read.)

Mr. WEINBEGRER. I want to object to the question as it is framed.

Q. Where did you get the $1,500 that you used along with other money to pay Rogers for this cargo?

A. I made it.

Q. I know, but did you keep it in any bank?

A. No.

Q. Carried it about in your pockets?

A. That is right.

Q. What was your income during the year 1932?

Mr. WEINBERGER. Objected to. That may look like another theory of the United States Attorney's, another case, but this is not the one. We are trying this case.

The COURT. I think you might ask him where he worked in 1932.

Mr. BESSON. It is overruled?

The COURT. Yes.

Q. What was your salary as an able seaman?

Mr. WEINBERGER. An A B seaman.

The COURT. That means able bodied seaman, to those of us who have been in the Navy.

Mr. WEINBERGER. Thank you, sir.

A. Eighty dollars a month.
Q. What?
A. Eighty dollars a month when I was working.
Q. How many months did you work for this pay?
A. I didn't work at all in 1932, as a seaman.
484 Q. In 1932 your income was gained entirely from cards and success in bets put upon horse races?
A. That is right.
Q. Had you made any arrangements to dispose of any part of the cargo on the "Evelyn"?
A. I refuse to answer on the ground that it may incriminate me.
Mr. BESSON. I think that is all.

Redirect examination by Mr. WEINBERGER:

Q. Mr. Rizzo, I show you a paper which is marked G–6 for identification and ask you to read that and state to the Court——
Mr. BESSON. I object to it as improper redirect examination.
The COURT. No; he may ask it. It is proper re-direct.
Mr. WEINBERGER. I haven't finished my question yet.
Q. (Question read as follows:) "Mr. Rizzo, I show you a paper which is marked G–6 for identification and ask you to read that and state to the Court—" whether or not you signed that and swore to that claim and whether it is the truth?
A. Yes, sir; I signed it, swore to it and it is the truth.

Recross-examination by Mr. BESSON:

Q. Then you do know——
Mr. BESSON. Have you anything further?
Mr. WEINBERGER. If there is no objection I should like to have the paper go in evidence.
485 Mr. BESSON. It is already part of the record of the Court.
Mr. WEINBERGER. You marked it.
Mr. BESSON. I marked it for identification so that it could be referred to.
The COURT. Mark it in evidence now.
(Paper previously marked G–6 for identification received in evidence and marked Exhibit C–16.)

Redirect examination (continued) by Mr. WEINBERGER:

Q. Mr. Rizzo, as a matter of fact, you say that you made this purchase which you have referred to as cargo and the chartering of the boats, the three of them, from Mr. Rogers?
A. Yes.
Q. Where did you meet Mr. Rogers and when was the transaction?
The COURT. That has been gone into once. This is redirect. He said the transaction went on in Mr. Rogers' office at Hudson Street, I think. I took the address down. Why do we want to go into that again?

Mr. WEINBERGER. If the Court please, what I wanted to make clear is this, that I do not believe anywhere in the examination did Mr. Besson touch on the question as to where he met Mr. Rogers to first discuss the question. True, he did say that he concluded the transaction in the office of Mr. Rogers down on Hudson Street.

The COURT. How is it material?

Mr. WEINBERGER. If it isn't material, all right, sir.

486 Q. Now, as a matter of fact, in this particular affidavit (C–16) which you swore to you say there were 146,157 gallons of alcohol. You knew you were swearing to that at the time?

A. Yes.

Q. And you did know it was alcohol, did you not?

A. Yes, sir.

Q. May I ask you whether or not you had received the, if you have a card of Mr. Rogers and place of his office?

A. Yes, sir.

Q. Whom did you deliver that to?

A. To my lawyer.

Q. And that is the card [indicating]?

A. Yes, sir.

Mr. WEINBERGER. I ask that be marked in evidence, if there is no objection. I am offering in evidence the card which was given him of Rogers.

Mr. BESSON. I have no objection.

Mr. WEINBERGER. I ask it be marked in evidence.

(Card received in evidence and marked Exhibit C–17.)

Mr. WEINBERGER. May I ask one further question?

Q. When you were arrested you had how much money in your pocket?

A. About five hundred ten or eleven dollars.

Q. In cash?

A. In cash.

Mr. WEINBERGER. That is all.

By the COURT:

487 Q. Why did you tell Mr. Pernisco you were only a watchman hired about half a day before that time and that Mr. Rogers was the owner of this ship cargo, or words to that effect?

A. Mr. Rogers was the owner up until only a couple of days before that and I wanted to know how I stood before I was going to admit that I was the owner.

Q. Do you know how you stand now?

A. No, sir.

Q. Why do you now admit something different from what you told the Government officers before?

A. I would like to get the cargo back if possible and the boats.

Q. What you told the Government officers that time was a lie, is that right?

A. Yes, sir.

By Mr. WEINBERGER:

Q. You were not sworn at that time, were you?

A. No, sir.

Mr. BESSON. I object to that.

Mr. WEINBERGER. I am asking——

The COURT. Oh, yes.

Mr. WEINBERGER. I think that is proper.

A. I was not under oath.

Q. You were not under oath at that time?

A. No, sir.

By the COURT:

Q. It makes a difference to you when you are talking whether you are under oath or not?

A. Yes, sir.

The COURT. I see. All right.

The WITNESS. Is that all?

The COURT. That is all.

488 Mr. BESSON. I would just like to ask him some questions.

Recross-examination by Mr. BESSON:

Q. When did you get that card that has been marked in evidence C–17?

A. I got that card about the 21st of November.

Q. Had you made any measurement of the quantity of alcohol that was in the boat, the "Evelyn" or rather in the barge?

A. Do you mean the quantity of the alcohol?

Q. Yes.

A. I took it for granted there was 150,000——

Q. Gallons?

A. Gallons of fuel there, yes.

Q. You knew it was alcohol, didn't you?

A. I refuse to answer.

Q. You have already testified?

A. Yes.

Q. Here that you signed a claim for it as alcohol?

A. Yes.

Q. And that was at the rate of, I will withdraw that question.

Did Rogers tell you or give you any reason why he wanted to dispose of this so hastily?

A. No, sir.

The COURT. This is what, re-re-cross?

Mr. WEINBERGER. I am allowing it on any theory the United States Attorney wants it.

The COURT. It will go on interminably.

Mr. WEINBERGER. I am letting him do it for only one reason.

Mr. BESSON. May I ask one more question if the Court will permit it?

489 Q. How long before the 22d of November, 1932, the day that you got this alcohol, did Rogers suggest to you that you buy it?

A. About three, about three days.

Q. And where?

A. He suggested it to me in a restaurant on Forty-eighth Street, New York.

Mr. BESSON. I see. That is all.

The COURT. What else is there in this case?

Mr. WEINBERGER. We rest except for the paper that the United States Attorney wanted to have, which is on its way down here.

The COURT. Yes. Have you some rebuttal, Mr. Besson?

Mr. BESSON. Yes, there is one thing I have to call here. I would like to recall this man Sheridan.

The COURT. Well, suppose we do that at quarter after two.

Mr. BESSON. All right.

(A recess was here taken until 2:15 P. M.)

AFTER RECESS

FRANK RIZZO resumed the stand.

Redirect examination by Mr. WEINBERGER:

Q. You were asked the question by the United States Attorney concerning the Exhibits R–1, R–2, and R–3——

The COURT. For identification.

Q. For identification. I ask you whether those are the papers that were referred to [indicating]?

490 A. [Looking at papers.] Yes sir.

Q. In whose handwriting was that made?

A. Mr. Rogers.

Q. On each of the papers?

A. Yes, sir.

Q. Referring to R–1, 2, and 3?

A. Yes.

Mr. BESSON. Whose handwriting?

Q. Mr. Rogers?

A. Mr. Rogers.

Q. Did you see him write it out and sign it?

A. Yes, sir.

Mr. WEINBERGER. That is all. May I offer them formally and ask that they go in evidence?

(Mr. Besson examines papers.)

(The Court examines papers.)

Mr. WEINBERGER. May they be formally marked R–1, 2, and 3, if the Court please instead of for identification?

Mr. BESSON. They are objected to on the ground that the witness has been unwilling to make true and full disclosure of all the circumstances connected with the transaction.

Mr. WEINBERGER. I don't know of that being the rule that would keep papers out.

The COURT. I will admit them over that objection.

Mr. WEINBERGER. May I again repeat, if the Court please, that the defense is prepared to make full disclosure and has made full disclosure. I don't agree with the remarks.

The COURT. All right.

Mr. WEINBERGER. That is all, Mr. Rizzo.

491 (Papers marked R–1, R–2, and R–3 for identification in evidence and marked Exhibits C–18, C–19, and C–20.)

Mr. WEINBERGER. We rest, if your Honor please, formally.

REBUTTAL

JOHN J. LYNCH, called in rebuttal on behalf of the Government, being duly sworn, testified as follows:

Direct examination by Mr. BESSON:

Q. Now, Mr. Lynch, do you know this man Sheridan, who was on the witness stand?

A. Yes, I know him.

Q. And you visited his office or——

A. On the tug "Paoli" is where he has, it is headquarters.

Q. Did he there exhibit to you a record book?

A. His record book, yes.

Q. Did you make a copy of it?

A. I made a copy, yes.

Q. What did that record book show?

Mr. WEINBERGER. Objected to.

Mr. BESSON. Withdraw the witness.

The COURT. Step down.

Mr. BESSON. I will call Sheridan.

492 JOHN SHERIDAN, previously sworn, being called in rebuttal, testified as follows:

Direct examination by Mr. BESSON:

Q. Mr. Sheridan, you kept a record book, didn't you, on the "Paoli"?

A. Yes.

Q. And this record showed the time of the arrival and departure and vessels in the yard?

Mr. WEINBERGER. One minute. That is objected to. What it showed is best evidenced by what it has in it.

The COURT. He can ask him whether it showed those things. Ask him what records he kept in the book?

Mr. WEINBERGER. Yes.

Q. What was the purpose of keeping this record book?

A. To determine the amount of wharfage due on boats docked there.

Q. And for that reason you showed the time of arrival and departure of vessels in the yard; isn't that right?
A. That is right.
Q. Where is this book?
A. I turned it over to Captain Walsh every two weeks.
Q. What became of the book for the period?
A. I don't know; I gave it to Captain Walsh.
Q. Captain Walsh?
A. Yes.
Mr. BESSON. Have you that book, Captain Walsh?
493 Mr. WEINBERGER. One minute. He refuses to answer under advice of his counsel.
Mr. BESSON. You are his counsel?
Mr. WEINBERGER. Yes; for the moment. He is my witness.
Q. Have you any recollection independent of this book as to how many times after the 22d of November the motor oil screw "Evelyn" left the yard at Port Johnson, Bayonne?
A. No; I couldn't remember that. It is too long for my memory.
Q. You know Mr. Lynch here, don't you?
A. Yes; I have met Mr. Lynch.
Q. You also know Mr. Norwood, the gentleman sitting at the end of the table here?
A. Yes.
Q. You know him?
A. I have seen that gentleman.
Q. You permitted those men to examine that book, didn't you?
A. No; I read from it, I believe, so far as I can recollect.
Q. You read from it to them?
A. Yes.
Q. And they took notes?
A. I believe so.
Q. In your presence?
A. Yes, sir.
Q. Were those notes correctly taken?
Mr. WEINBERGER. One minute, objected to. That calls for a conclusion on this witness's part.
Mr. BESSON. I don't see how it calls for a conclusion if the man saw the notes and compared them with the book.
494 The COURT. He didn't say he did that. He said he saw them taking notes.
Q. Did you observe what notes they were taking?
A. No; I didn't read what they had written.
Q. You were reading from the book and they were making notes?
A. Yes, sir.
Q. But what they noted, you don't know?
A. No; I don't know.
Q. What did you read to them from the book?
Mr. WEINBERGER. Objected to.
The WITNESS. I beg your pardon.

Mr. WEINBERGER. I am objecting, sir. I object on the ground that the book is the best evidence of what it contained. That is fundamental.

Mr. BESSON. Counsel has even announced here it would not be produced.

Mr. WEINBERGER. I beg your pardon. Even the United States Attorney must do things legally and lawfully. We poor defendants, you know, that is one thing, but the Government—There is a way of doing things. I object to the method and manner.

Mr. BESSON. May I press the question, if your Honor please.

The COURT. What is the question?

(Question read as follows: "What did you read to them from the book?")

The COURT. No; you may not press that.

Mr. BESSON. I want to, if your Honor please, to identify to the Court that this book, that entries were read from this book.

The book, of course, is not in court here and there is this sit-
495 uation before the Court. I was not apprised of the fact that the Government agents had the copy of the entries from the book until this morning. I didn't know that and it was through a misapprehension on the part of Mr. O'Keefe. He was of the impression I had a copy of that in my file and he handed it to me this morning.

The COURT. Is there anything important about it?

Mr. BESSON. Yes, sir; it is important for this reason, that it shows——

The COURT. Even Mr. Sheridan says the boat came in in November.

Mr. BESSON. That is since November 22d.

Mr. WEINBERGER. I don't think he said that.

The COURT. I think Sheridan did.

Mr. BESSON. He said in his original testimony, he said it came and went seven times.

Mr. WEINBERGER. Yes.

The COURT. Six or seven.

Mr. WEINBERGER. Six or seven times. He didn't say it was not before the 23d of November, but the point I am making a formal objection to this is that you cannot collaterally go into issues that collaterally have no bearing on this case as to the issues involved. What do I care what the book contains?

Mr. BESSON. That has a very important bearing on the case because for violation of the navigation laws title passes by forfeiture, and the passing of title by forfeiture is of the date when an offense is committed.

Mr. KESSLER. That is interesting.

496 Mr. BESSON. There is an abundance of decisions on that, and it is one of the things that differentiate a proceeding in rem from a civil proceeding.

Mr. KESSLER. May I ask counsel to produce one of those decisions that are abundant?

Mr. BESSON. Yes; I will get them out for you.

The COURT. In some cases it does for violation of some navigation laws, and for violation of some navigation laws there is a penalty of $100, some of them $5, and some of them $10.

Mr. BESSON. I have in mind, if the Court please, the violation of the navigation act which relates to the use of the vessel for a purpose other than that permitted by its enrollment and license, operating or transporting of alcohol is a violation of the revenue laws, and is in fraud of the revenue.

Mr. KESSLER. The prosecutor asks one question and argues about a different matter. Assuming he is correct in what he said now it has no relation to the question pending, which is how many times did this boat go in and out.

Mr. BESSON. It has something to do with it, because Mr. Rizzo, the claimant, has already testified that the boat left Nyack, came into this place and laid there for a period of about twenty-four, more than that——

The COURT. From the 23d of November on, Thanksgiving Day.

Mr. BESSON. About twenty-two days.

The COURT. Yes.

Mr. BESSON. Now, I want to show that was not true.

497 Mr. KESSLER. All right. I don't care so far as the boat owner is concerned. The question is how many times did this boat which had nothing on, there is no contention there was anything on this boat, which was navigable, went in and out. What difference does it make? It is entirely immaterial.

Mr. BESSON. By his own testimony he admits the boat was loaded with alcohol on the 22d of November when it came down.

Mr. KESSLER. Not the "Evelyn."

Mr. BESSON. One of the three boats was loaded. He bought the cargoes of the three boats.

Mr. KESSLER. The prosecutor is now asking about the boat that came in under its own power.

The COURT. I understand the "Evelyn" went in and out.

Mr. BESSON. Yes, sir.

The COURT. According to the testimony of Mr. Sheridan, that was after Thanksgiving Day.

The WITNESS. Well, I don't—my memory is not so very good as to recollect the exact dates.

Q. Can you recall that it went in and out after Thanksgiving Day?

A. I know the boat during the period she was in there, from the time she came in, made frequent trips out and in.

By the COURT:

Q. Do you mean the last time?

A. No; I mean from the time she first came to the dock.

Q. Oh. When was that?

A. That was in September, I believe, wasn't it?

498 Q. How long was it there?

A. Well, until it was taken, until she was seized in December.

Q. She was seized on December 12th?

A. Yes. From the time she came there first. But I have no definite recollection of any one time.

Q. You had definite recollection this morning of her being brought in the day before Thanksgiving Day, you fixed that day yourself?

A. Yes; they all came in that day because they had been out, all three of them, all came back again.

Q. Yes. Now, don't you recollect the boat went out after Thanksgiving Day?

A. My impression is that she did, but I cannot definitely say it.

Mr. WEINBERGER. May I move his impression be stricken?

The COURT. Yes. All right.

By Mr. BESSON:

Q. But you kept a record of the movement?

A. Yes.

Mr. BESSON. That is one item of testimony I think I would like to produce before the Court.

Mr. KESSLER. As far as the boat is concerned, may I submit it is immaterial whether a boat went in or out, entirely collateral to the issue.

The COURT. That does not affect, as I see it, the boat situation particularly, the ownership of the boat. It does affect Rizzo's statement if it can be proved, and can be used as a basis for an argument attacking the credibility of Rizzo.

Mr. WEINBERGER. May I formally say to Your Honor now that that is at best a matter which is collateral. I don't quite agree with Your Honor as to its legal efficacy in regard to credibility.

499 The COURT. Well, the fact is, Mr. Weinberger, the book Captain Walsh received according to this witness—I suppose the United States attorney might subpœna Captain Walsh to produce the book here.

Mr. WEINBERGER. May I say now, Captain Walsh was on the stand and he was never interrogated about the matter.

The COURT. Yes; he referred to the matter.

Mr. WEINBERGER. If Mr. Besson wishes to put him on the——

The COURT. The captain seemed to be a little hazy about the records, as I recall his testimony; he didn't volunteer the information he had a book given to him by Sheridan.

Mr. WEINBERGER. I don't want to argue this matter, if the Court please, piecemeal. I submit this point in the case, the question now asked is improper and I cross any bridge I come to when I get to it.

The COURT. Yes. I think the question is improper at this time from this witness, Mr. Besson. I don't see how he can verify the

notations made by the officers, and unquestionably the records in the book themselves would be the best evidence.

Mr. BESSON. I have stated the peculiar situation with respect to this record. I was unaware of it.

The COURT. Peculiar situations won't change the laws of the rules of evidence.

Mr. BESSON. I am not asking the Court to change the law. I am asking the Court to give me an opportunity to produce the book.

500 Mr. WEINBERGER. At this point we are not confronted with that now.

The COURT. All right.

Mr. WEINBERGER. Is counsel through with the witness?

The COURT. Yes.

Mr. WEINBERGER. May I ask he be excused. That is all.

Mr. BESSON. I think that is all, if the Court please, except for that book.

Mr. KESSLER. Except for what book?

Mr. BESSON. If the Court would give me the opportunity to offer it.

Mr. WEINBERGER. There is Captain Walsh here. Why doesn't he put him on the stand and find out if there is such a record and all about it? Why delay any further?

Mr. BESSON. Captain Walsh.

Mr. WEINBERGER. I have no objection to his making him his witness, but I didn't like the tête á tête in the court room, that is all.

The COURT. All right.

JAMES R. WALSH, previously sworn, being called in rebuttal, testified as follows:

Direct examination by Mr. BESSON:

Q. Captain, do you know Sheridan, the previous witness?

A. Yes, sir.

Q. He is employed by you?

501 A. Yes, sir.

Q. Now, did he turn over to you a book showing the record of the vessels arriving and leaving your yard?

A. He does that every week.

Q. And where is the book showing that record between November 22, 1932, and December 12, 1932?

Mr. KESSLER. We object to that testimony so far as the boat owner is concerned, on the ground it is immaterial and has no relevancy to any issue raised in this case.

The COURT. Let him answer it.

Mr. WEINBERGER. May I also formally object on the ground that if assuming Rizzo was asked a question concerning the boat leaving or not leaving, it is on a matter collateral, foreign to the issues involved, not raised under the pleadings, it is not a ground of forfeiture alleged in the pleadings and it has no evidential value, certainly.

The COURT. All right. He hasn't got the book with him, anyway.

Mr. BESSON. No. I wanted to find out, maybe he hasn't the book at all, if your Honor please.

Q. Where is the book?

A. The book is in my residence.

Q. In Jersey City?

A. Yes.

Q. And you could produce it here if you had an opportunity?

A. I couldn't produce that particular part of it.

Q. Why?

A. Because it is a loose-leaf book, and, as I explained before, we keep a record of the boats that come in day by day. The
502 ones there by the month I told Sheridan there is no need to take any record of their comings or goings. They are paid straight through.

Q. Did you destroy the book?

A. No; I took the two leaves referring to the "Doris", "Helen", and "Evelyn" from the book.

Q. What became of them?

A. I suppose I put them in the waste basket.

Q. So they are lost?

A. I don't know where they are.

Mr. BESSON. All right. That is all. Recall Agent Lynch.

JOHN J. LYNCH, recalled.

Direct examination by Mr. BESSON:

Q. Did you examine Sheridan's book?

A. I did.

Colloquy

Mr. WEINBERGER. I object to that on the ground he is attempting to impeach Sheridan, who was his witness.

Mr. BESSON. I am not. I am attempting to offer evidence of the contents of the book, it having been shown the pages were destroyed.

Mr. WEINBERGER. I object on the ground Sheridan has testified a moment ago that Mr. Lynch did not look at the book, that he read the factors to him from the book. Now, sir, he is asking this witness, did you examine the book. That is impeachment of a witness' testimony.

Mr. BESSON. No; I would like to refer back to the testimony. I may say, in addition to this, the mere fact that a witness whom I may call may contradict in some particular the testimony of a previous witness does not constitute impeachment.

503 Mr. WEINBERGER. That is not contradiction. That is destruction.

Mr. BESSON. It is the weight of the testimony.

Mr. WEINBERGER. That is an attempt at destruction, that is not contradiction; that is destruction, impeachment.

Q. Did you examine the book?

Mr. WEINBERGER. Object to that on the ground it is attempting to impeach the testimony of their witness Sheridan, who just said he didn't examine the book.

The COURT. Mr. Besson, if all that you want to accomplish is to show this boat came in and out several times in addition to what has been testified to during the trial, it is not worth the attempt.

Mr. BESSON. Well, of course the only thing I consider about that is this, this witness or Rizzo in his own behalf has testified he boarded these boats at Nyack, sailed with them to Port Johnson, and that that occurred on November 22d, the day that this charter was assigned to him by the Rogers Oil Company. Now, he has testified that after these boats arrived at Port Johnson they remained there. I wanted to show evidence to contradict him, also to show that the possibilities of these boats sailing in and out of this place with the same cargo on, being one that was removed from the probability of truth.

The COURT. We are not going to deal with possibilities. We don't have to in this case, Mr. Besson.

Mr. BESSON. I won't press the matter further then, your Honor. May I ask one question? There is no question about these enrollments being in evidence?

The COURT. They are in evidence, I think.

Mr. BESSON. I think that is all then. The Government rests.

504 Mr. WEINBERGER. We rest so far as Rizzo is concerned.

Mr. KESSLER. We have nothing further for the boat owners.

The COURT. All right.

(It was agreed that Mr. Weinberger submit a memorandum of authorities to Mr. Besson by Monday, April 10, and that Mr. Besson have two days in which to file a memorandum.)

505 In United States District Court

Certificate of Judge Forman

Filed August 8, 1933

I, PHILLIP FORMAN, Judge of the United States District Court in and for the District of New Jersey do hereby certify that the foregoing is a true and correct transcript of the testimony taken in cases Nos. A–7814, A–7813, A–7815, and A–7811, which testimony was stenographically taken in my presence.

IN WITNESS WHEREOF I have hereto affixed my hand and caused the seal of this Court to be affixed hereto this eighth day of August, A. D. 1933.

[SEAL] FORMAN, *Judge.*

Attest:

GEORGE T. CRANMER,
Clerk.

Per B. F. HAVENS,
Chief Deputy.

506 [Blank.]

507 In United States Circuit Court of Appeals for the Third Circuit

No. 5247. October Term, 1933

FRANK RIZZO, CLAIMANT, ETC., APPELLANT
vs.
UNITED STATES, APPELLEE

Appeal from the District Court of the United States for the District of New Jersey

Order assigning judge

Filed Dec. 7, 1933

And now, to wit: This 7th day of December A. D. 1933, it is ordered that Hon. Albert W. Johnson, district judge for the Middle District of Pennsylvania, and Hon. , district judge for the district of ; be, and he is hereby, assigned to sit in above case in order to make a full court.

JOSEPH BUFFINGTON, *Circuit Judge.*

[File endorsement omitted.]

In United States Circuit Court of Appeals for the Third Circuit

[Title omitted.]

Minute entry

And afterwards, to wit, the 7th day of December 1933, come the parties aforesaid by their counsel aforesaid, and this case being called for argument sur pleadings and briefs, before the Honorable Joseph Buffington and Honorable J. Warren Davis, circuit judges, and Honorable Albert W. Johnson, district judge, and the court not being fully advised in the premises, takes further time for the consideration thereof.

In United States Circuit Court of Appeals for the Third Circuit

[Title omitted.]

Petition to reverse decrees

Filed Sept. 13, 1934

To the Honorable Judges of the United States Circuit Court of Appeals for the Third Circuit:

The petition of Harry H. Weinberger, a member of the firm of Minturn & Weinberger, proctors for claimant, Frank Rizzo, respectfully shows to this court and alleges as follows:

508 1. On or about December 22, 1932, a libel was filed in the United States District Court for the District of New Jersey against 146,157 gallons of alcohol. Thereafter, on or about the 23rd day of December 1932, a claim and answer, together with exceptions was interposed by the claimant Frank Rizzo. And the libelant filed excepted allegations to the claim on the 27th day of December 1932. On or about December 30, 1932, amendments to the libel were filed by permission of the court, and the claimant filed his exceptions and answers to the same. The original libel requested a forfeiture of the 146,157 gallons of alcohol on four distinct grounds, which ground of forfeiture alleging a violation of a provision of the United States statutes.

Hearings were subsequently had before the Honorable Philip Forman, United States district judge, who rendered two opinions in the matter, one of which was filed on March 22, 1933, and the other May 9th, 1933, and each opinion decreeing that the 146,157 gallons of alcohol be forfeited in accordance therewith. On June 29th, 1933, in accordance with the opinion of the court, an amended decree of forfeiture was entered directing that the said 146,157 gallons of alcohol be condemned as forfeited to the United States of America for violation of section 4377 of the Revised Statutes of the United States (title 46, section 325, United States Code). The amended final decree of forfeiture as entered by the United States district judge in the district of New Jersey of the 146,157 gallons of alcohol was based solely upon a violation of section 4377 of the Revised Statutes of the United States which by its terms made the possession of alcohol contraband merchandise and subject to forfeiture by reason of a seizure under the provisions of the National Prohibition Act.

3. Appeals were taken from the final decrees hereinabove referred to and the matter was docketed in this court under Docket No. 5247. Included in the transcript of record on appeal were the libels which were filed by the United States of America seeking forfeiture of the three vessels carrying the alcohol aforesaid and bearing Docket No. 5284. The appeals from the decrees of forfeiture in the several cases referred to were argued before this honorable court and briefs were filed with this court pursuant to the practice. Up to the present time this court has not rendered its opinion in this matter, but has handed

down a decision pertaining to the appeal filed with regard to the vessels, which said opinion was filed by this honorable court on August 16th, 1934, and to which said opinion the petitioner begs leave to refer to for greater certainty, wherein and whereby it was directed that the decrees forfeiting the vessels were reversed with directions to discharge the vessels and dismiss the libels.

4. Since the filing of the briefs on appeal herein, and since the argument of the respective proctors in the matter, the eighteenth amendment to the Constitution of the United States of America has been repealed by virtue of the ratification of the twenty-first
509 amendment to the United States Constitution became effective on December 5th, 1933. In view of the change in the Constitution of the United States, the status of the appeal herein has been materially effected, and also by reason of the decision of the Supreme Court of the United States decided February 5th, 1934, in the case of United States of America v. Claude Chambers and Byrum Gibson, 291 U. S. 217; Massey v. United States, 291 U. S. 608, and the decisions of the Circuit Court of Appeals for the Third Circuit, in the cases of McClure v. United States, 70 Fed. (2nd) 519; Matoil Service and Transport Company, Claimant of Oil Barge Helen, Her Engines, etc.; Motor Oil Screw Evelyn, Her Engines, etc.; and Oil Barge Doris, Her Engines, etc., vs. United States of America, No. 5284. March term, 1934. Filed August 16th, 1934; interpreting the legal effect of the amendment as applied to cases pending on appeal, it is respectfully submitted that the final decrees of forfeiture heretofore entered in the United States District Court for the District of New Jersey, should be reversed and the 146,157 gallons of alcohol or the money realized from its sale, if sold, which is on deposit in the registry of the United States District Court for the District of New Jersey, be discharged from the custody of the said United States District Court for the District of New Jersey and returned to the claimant, Frank Rizzo, and that said libel should be dismissed with costs to the claimant.

5. Petitioner also begs leave to refer to the fact that only recently by the United States District Court for the District of Connecticut, in an opinion delivered by Thomas, D. J., on July 31st, 1934, in the matter of United States of America vs. American Gas Screw Choctows, No. 3478 Adm., also dismissed a libel involving the Choctows, containing a cargo of approximately 898 sacks and a number of kegs of whiskey. Precisely the same questions of law presented in this case were presented there, and though the decision, of course, is one in the District Court, we mention it because of the fact that the court dealt with the same legal questions in a manner upholding the views entertained by counsel for the appelant, and in every instance disposing of the Government's contention in precisely the same manner as was done by this honorable court in the Matoil Service and Transport Company, Claimant of Oil Barge Helen, Her Engines, etc.; Motor Oil Screw Evelyn, Her Engines, etc.; and Oil Barge Doris, Her Engines, etc., vs. United States of America, supra.

6. Petitioner therefore alleges that the said 146,157 gallons of alcohol or the proceeds derived from its sale, if in fact sold, should be returned to the claimant, Frank Rizzo, in view of the fact that the libel proceedings herein are still pending and have not been determined since the ratification of the twenty-first amendment to the United States Constitution.

Wherefore, your petitioner respectfully prays that the decree of forfeiture filed May 29th, 1933, and the amended decree of forfeiture filed June 29th, 1933, in the United States District Court for the District of New Jersey, be reversed and that the said
510 146,157 gallons of alcohol, or the proceeds derived from the sale of the same, be discharged from the custody of the United States District Court for the District of New Jersey, and that the libel filed herein be dismissed with costs to the claimant of the said 146,157 gallons of alcohol and for such other and further relief as to this court may seem just and proper.

MINTURN & WEINBERGER,
Proctors for Petitioner-Claimant.

[*Duly sworn to by Frank Rizzo, jurat omitted in printing.*]
[File endorsement omitted.]

In United States Circuit Court of Appeals for the Third Circuit

[Title omitted.]

Answer of the United States of America to petitioner Frank Rizzo

Filed Sept. 13, 1934

To the Honorable Judges of the United States Circuit Court of Appeals for the Third Circuit:

Now comes the United States of America by Harlan Besson, United States attorney in and for the district of New Jersey, and says, in answer to the petition of Frank Rizzo heretofore filed in this cause on September 8, 1934, that:

1. It admits that on December 22, 1932, a libel was filed in the United States District Court in and for the District of New Jersey against 146,157 gallons of alcohol, and that on December 23, 1932, a claim and answer, together with exceptions to said libel, were interposed by Frank Rizzo as claimant; that the libellant filed exceptive allegations to Frank Rizzo's claim on December 27, 1932, and that on December 30, 1932, amendments to said libel were filed by permission of the court, and the claimant filed his exceptions and answers to the same; it further admits that the libel filed
511 in said cause prayed for the forfeiture of the said 146,157 gallons of alcohol by reason of the violation of certain provisions of the statutes of the United States, and that hearings were subsequently had before the Honorable Phillip Forman, United States District Court judge, who subsequently signed a decree on

May 29, 1933, condemning as forfeited the said 146,157 gallons of alcohol for violation of the provisions of sec. 4377 of the Revised Statutes of the United States (title 46, sec. 325, U. S. C.); it further admits that thereafter on June 29, 1933, the United States District Court amended its decree of forfeiture, but solely with respect to the disposition of the forfeited alcohol, it having been provided in the decree entered on May 29, 1933, that the forfeited alcohol be delivered to the coordinator of the second area, as is more fully and at large set forth in said decree, and that the amended decree provided for the sale of the alcohol at public auction instead of its delivery to the coordinator, as is more fully and at large set forth in said decree.

2. It is admitted that an appeal was taken from the final decree entered in said cause, and that the matter was docketed in this court under Docket No. 5247, and that included in the transcript on appeal were the libels which were filed by the United States of America seeking forfeiture of the three vessels carrying the alcohol aforesaid, and bearing Docket No. 5284, and that said appeals from the decrees of forfeiture in the several cases referred to were argued before this honorable court, and briefs were filed with this court pursuant to its practice, and that up to the present time, this court has not rendered its opinion in this cause, but has handed down an opinion on August 16, 1934, in the cause relating to said vessels, which was docketed as No. 5284, and that by the terms of said opinion, it was the finding of the court that decrees be entered reversing the decrees of the United States District Court for the District of New Jersey, forfeiting said vessels, and directing that said vessels be discharged, and the libels against them be dismissed.

3. It is admitted as alleged in paragraph 4 of said petition that since the filing of the briefs on appeals herein and the argument with respect thereto by proctors in this cause, that the eighteenth amendment to the Constitution of the United States has been repealed by virtue of the twenty-first amendment to the Constitution, which became effective on December 5, 1933; that the balance of said paragraph is denied insofar as it is alleged therein that the repeal of the said eighteenth amendment to the Constitution in any wise affected this cause, and that the decisions cited in said fourth paragraph have no relation whatsoever to the questions involved in this cause, and afford no basis for the reversal of the decrees of the United States District Court entered in this cause, from which an appeal is now pending.

4. That the allegations of paragraphs 5 and 6 afford no reason for the dismissal of the libel filed against the said 146,157 gallons of alcohol, or for the return of said alcohol to the said Frank
512 Rizzo; that the said Frank Rizzo is not properly described as claimant in this cause, because he has failed to establish that he is in fact a proper claimant to the said alcohol and has failed to establish that he has any lawful right or interest therein, and

that he has no status whatever to appear in this cause or to file any petition, and that it has been expressly determined by the United States District Court for the District of New Jersey that he had no status as claimant in this cause.

5. It is further alleged that the said alcohol was properly condemned as forfeited for violation of the provisions of R. S., sec. 4377 (title 46, sec. 325, U. S. C.), because the said vessel was being used in a trade in fraud of the revenue of the United States, and that an allegation in the libel to the effect that said vessel was transporting alcohol in violation of the National Prohibition Act was in legal effect and allegation that the said alcohol was being carried without payment of tax due the United States of America, and that said alcohol was properly the subject of forfeiture.

Respondent respectfully prays that the petition of said Frank Rizzo, alleged claimant herein, be dismissed, with costs as against him.

Respectfully submitted.

UNITED STATES OF AMERICA,
By HARLAN BESSON,
United States Attorney.

[File endorsement omitted.]

In United States Circuit Court of Appeals, for the Third Circuit

No. 5247. October term, 1933

UNITED STATES OF AMERICA, LIBELLANT-APPELLEE

vs.

UNITED STATES OF AMERICA, LIBELLANT-APPELLEE

Appeal from the District Court of the United States for the District of New Jersey

Opinion

Filed October 2, 1934

Before BUFFINGTON and DAVIS, Circuit Judges, and JOHNSON, District Judge

513 PER CURIAM:

This case is here on appeal from final decrees of the District Court denying the claim of the appellant for 146,157 gallons of alcohol and ordering it forfeited on the ground that it was contraband

merchandise and subject to seizure and forfeiture under the provisions of the National Prohibition Act which was then in force.

The claimant has filed a petition praying for the reversal of the decrees forfeiting the alcohol and that it, or the money realized from its sale, should it be sold, be discharged from the custody of the United States District Court and returned to the claimant.

The facts in this case so far as they bear upon the question here involved are substantially identical with those in the case of Matoil Service and Transport Company v. United States, Fed. (2d) (decided August 16, 1934). The decision in this case is controlled by the cases of United States v. Chambers & Gibson, 291 U. S. 217; Massey v. United States, 291 U. S. 608; McClure et al. v. United States, 70 Fed. (2d) 519 and the Matoil case.

Accordingly the decrees forfeiting the 146,157 gallons of alcohol are reversed with directions to dismiss the libels filed herein and discharge the alcohol from the custody of the United States District Court and return it, or the proceeds of the sale, if sold, to the claimant.

A true copy.

Teste:

Clerk of the United States Circuit Court of Appeals for the Third Circuit.

In the United States Circuit Court of Appeals for the Third Circuit

No. 5247. October term, 1933

FRANK RIZZO, CLAIMANT OF 146,157 GALLONS OF ALCOHOL, APPELLANT

vs.

UNITED STATES, APPELLEE

Appeal from the District Court of the United States, for the District of New Jersey

Decree

Filed Oct. 2, 1934

This cause came on to be heard on the transcript of record from the District Court of the United States, for the District of New Jersey, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged, and decreed by this court that the decrees of May 29, 1933, and June 29, 1933, of the said District Court forfeiting the 146,157 gallons of alco-

hol be, and the same are hereby, reversed, with directions to
514 the said District Court to dismiss the libels and discharge the alcohol from the custody of the United States District Court and return it, or the proceeds of the sale, if sold, to the claimant.

Philadelphia, October 2, 1934.

J. WARREN DAVIS,
Circuit Judge.

[File endorsement omitted.]

In United States Circuit Court of Appeals for the Third Circuit

[Title omitted.]

Petition

Filed Nov. 19, 1934

The petition of Harry H. Weinberger, of the firm of Minturn & Weinberger, proctors of the claimant, Frank Rizzo above named, respectfully represents:

1. That he is in actual charge of the above litigation.

2. That on the 28th day of June 1933, a decree was entered in the above-entitled cause, condemning as forfeited to the United States, the said 146,157 gallons of alcohol, the subject matter of this cause of action.

3. That the said decree further provided that the said sale be conducted by the United States marshal for the district of New Jersey, and that the sale be at public auction and sold to the highest bidder, said bidder to be authorized by law to purchase and receive alcohol. Said decree further provided that the proceeds of the said sale be deposited in the registry of this court to await the final determination of this proceeding, and upon such sale being had, the proceeds be substituted in place and stead of 146,157 gallons of alcohol, and that thereafter all further proceedings shall continue against the proceeds realized on the said sale of said alcohol.

4. That after the entry of the said decree on appeal, therefrom was duly taken to the Circuit Court of Appeals for the Third Circuit, and upon argument duly had, and on the record of the District Court, the Circuit Court of Appeals reversed the said decree of the District Court, with the following directions, to wit: To dismiss the libels filed herein and discharge the alcohol from the custody of the United States District Court and return it, or the proceeds of the sale, if sold, to the claimant.

5. That the said alcohol has not yet been sold as provided in the said decree of the District Court, and your petitioner now prays for an order directing the United States marshal for the district
515 of New Jersey to proceed with the said sale in accordance with the said decree.

6. That an application has been made to this honorable court for rehearing, and that there has been filed by Honorable Harlan Besson, as United States attorney for the district of New Jersey, a petition for rehearing which is now pending before this honorable court.

7. That on Friday, the 26th day of October 1934, application was made to Honorable Philip Forman, as United States district judge for the district of New Jersey, for an order directing the sale of the said 146,157 gallons of alcohol. The said Honorable Philip Forman questioned his right and authority to make and order at this time directing the sale, in view of the fact that the matter was still pending before this honorable court, and suggested that an application be made to the United States Circuit Court of Appeals for the Third Circuit.

8. That, hereafter, notice was served on Harlon Besson, as United States attorney, that application would be made on November 5th, 1934, before the United States Circuit Court of Appeals, for an order directing the United States marshal for the district of New Jersey, to offer for sale at public auction the said 146,157 gallons of alcohol, and that the money realized from the sale thereof be deposited in the registry of the United States District Court.

9. That said application was duly presented on said date to this honorable court, but the court suggested that the matter hold over until disposition might be made of the petition for rehearing.

10. That since said application was made for the order of sale of the cargo to this honorable court on November 5th, 1934, demand has been made of the claimant, Frank Rizzo, for the delivery of the barge Doris, containing the cargo of alcohol, by Chester A. Poling, Inc., engaged in the petroleum transportation business at no. 70 Pine Street, New York City. It purchased the said barge Doris and the Evelyn and Helen, possession having been given immediately to the Helen and Evelyn, but assurances made that the Doris would be delivered within the course of a few days after October 31st, 1934, the date upon which the sale was consummated and bill of sale delivered.

11. Up to the present time, no disposition has been made of this matter and threats have been made by the said Chester A. Poling, Inc., to institute legal proceedings for the recovery of damages for the failure to deliver the said barge Doris. Attached hereto and made part hereof is a copy of the letter from Chester A. Poling, Inc., bearing date November 16th, 1934, and addressed to Mr. Louis Halle, who is associated in the said litigation with the petitioner herein. There is also attached and made part hereof, a copy of a letter from Mr. Louis Halle, bearing date November 16th, 1934, addressed to your petitioner and to which petitioner begs leave to refer to for greater certainty, and which letters were received by the said petitioner through the mail.

12. Petitioner further alleges that it is obvious that litigation will ensue and the claimant, Frank Rizzo, will undoubtedly be
516 compelled to pay a substantial sum of money as damages for failure to deliver the said barge Doris, unless this honorable court orders the sale of the said cargo forthwith.

13. The circumstances now existing with regard to this matter, makes it imperative that this application be forthwith made to this honorable court, and that immediate relief be accorded to the said Frank Rizzo so as to prevent him from being held liable or responsible in any way to the owner of the barge Doris, the Matoil Service and Transport Company, or to the purchaser, Chester A. Poling, Inc., who purchased the same from the Matoil Service and Transport Company. There is also attached hereto and made part hereof an affidavit of Mr. Samuel I. Kessler, the proctor of the Matoil Service and Transport Company, which petitioner respectfully begs leave to refer to and urge in the consideration of this matter.

Wherefore, petitioner respectfully prays that an order may be made forthwith directing the United States marshal for the district of New Jersey to proceed with the said sale in accordance with the order made by the United States District Court concerning the sale of the alcohol, and which appears on page 55 of the transcript of the record and provides as follows:

"It is further ordered, that pending the said appeal from the said final decree as amended, that the proceeds of sale, as ordered, adjudged and decreed by the said amended decree, be deposited and held in the registry of this court and substituted in the place and stead of the 146,157 gallons of alcohol, mentioned and described in said amended decree, and that all further proceedings herein shall be against said proceeds of sale deposited in the registry of this court, subject to the disposition thereof by the United States Circuit Court of Appeals for the Third Circuit.

"FORMAN, *Judge.*"

HARRY H. WEINBERGER,
Proctor for Claimant, Frank Rizzo.

[*Duly sworn to by Harry H. Weinberger, jurat omitted in printing.*]

517 CHESTER A. POLING, INC.,
PETROLEUM TRANSPORTATION,
70 Pine Street, New York, N. Y., November 16, 1934.

Mr. LOUIS HALLE,
Knickerbocker Building, New York City.

DEAR SIR: On October 31, 1934, you negotiated the sale of the barge "Doris" and at that time a cash payment was made, by us, to you for the vessel and the bill of sale delivered to us.

At that time you promised that the "Doris" would be delivered to us within a few days and it was with this understanding that

we paid for the boat. It is now almost three weeks and we understand the "Doris" is still in the custody of the Government due to the fact that the alcohol therein has not been disposed of and we cannot obtain delivery of our property until the Government pumps out the alcohol.

Unless we can get delivery of our property, at once, we will be obliged to take legal steps, as we are losing over one hundred dollars each day of the delay.

Very truly yours,

CHESTER A. POLING, INC.

LOUIS HALIE,
COUNSELOR AT LAW.

152 West 42nd St., New York City, November 16, 1934.

Wisconsin 7–1351–2–3.

HARRY WINEBERGER, Esq.,
60 Park Place, Newark, N. J.

DEAR MR. WEINBERGER: The enclosed is a letter this day received from Chester A. Poling, Inc.

Please see that this matter is attended to immediately, otherwise I will have a lawsuit on my hands.

Very truly yours,

LOUIS HALIE.

STATE OF NEW JERSEY,
County of Essex, ss:

Samuel I. Kessler, of full age, being duly sworn according to law upon his oath, deposes and says:

1. I am the proctor of the Matoil Service and Transport Company, claimant of oil barge "Helen", her engines, etc.; motor oil screw "Evelyn", her engines, etc., and oil barge "Doris", her engines, etc., and which said company was the defendant-appellant in the cause no. 5284 against the United States of America as libellant-appellee, argued before this honorable court, and which cause was eventually decided in favor of the said Matoil Service and Transport Company and against the United States of America, reversing the judgment of the United States District Court and adjudicating the dis-
518 missal of the libels and the return of the said vessel unto the Matoil Service and Transport Company.

2. That thereafter, a petition was made for certiorari to the United States Supreme Court by the United States of America, with the result that on or about October 22nd, 1934, the said application was denied and the decision of this honorable court thereby affirmed.

3. That on October 31st, 1934, the sale was effected of these three vessels to Chester A. Poling, Inc., and bills of sale delivered and

money paid therefor, the transaction being consummated through Mr. Louis Halle, associate counsel, as more fully appears in the letter of Chester A. Poling, Inc., of no. 70 Pine Street, New York City, addressed to Mr. Louis Halle, a copy of which letter is attached to the petition made by Mr. Harry H. Weinberger.

4. Suit has been threatened against my client, and unless delivery is made forthwith, it may be that this entire transaction will be rescinded by the purchaser, which would, of course, entail great loss and irreparable damage to my client, and which situation I desire to avoid; or on the other hand, a suit for damages may be instituted on the theory that the purchaser is losing over $100 each day of the delay.

5. May I call this honorable court's attention to the fact that there is no telling when this matter involving the cargo may be concluded and how long a delay may be occasioned before this matter is finally disposed of so as to enable the return of this barge. Unless, therefore, this honorable court directs the delivery of this barge by disposing of the cargo therein contained, a dilemma confronts my client which may result in tremendous and substantial losses with the serious question as to whether or not any relief may thereafter may be had against the claimant, Frank Rizzo, in the event of his not succeeding in said litigation.

Wherefore, I respectfully join in the application to this honorable court, directing that the cargo be disposed of so as to enable the immediate delivery of the said barge "Doris" to Chester A Poling, Inc., the purchaser thereof.

SAML. I. KESSLER.

Sworn and subscribed to before me this 19th day of November 1934.

LOUISE B. DRUINS,
A Notary Public of New Jersey.

[File endorsement omitted.]'

519 In United States Circuit Court of Appeals for the Third Circuit

[Title omitted.]

Order to show cause

Filed Nov. 19, 1934

This matter being opened to the court by Harry H. Weinberger, proctor of Frank Rizzo, the claimant, and the court having duly considered the verified petition submitted, it is, on this 19th day of November 1934,

Ordered, that the United States of America show cause before the United States Circuit Court of Appeals at the Post Office Build-

ing, Philadelphia, Pennsylvania, on the 22nd day of November 1934, at two (2) o'clock in the afternoon or as soon thereafter as counsel can be heard, why

1. An order should not be entered directing the United States marshal, for the district of New Jersey, to sell at public auction the 146,157 gallons of alcohol, the subject matter of this cause, and to deposit the proceeds realized therefor, in the registry of the United States District Court, to await the disposition of the pending application for rehearing, and to pay the same to the said Harry H. Weinberger, as proctor of the said Frank Rizzo, if said application for rehearing is denied; and

2. Why such further relief should not be granted as may be prayed for in said petition and necessary under the circumstances existing in this cause; and it is further

Ordered, that a copy of said petition and order to show cause be served upon Harlan Besson, United States attorney as proctor for the libellant in the said cause, within one day from the date hereof, which said petition and order to show cause may be certified by the proctor of the claimant.

J. WARREN DAVIS, *Circuit Judge.*

[File endorsement omitted.]

520 In United States Circuit Court of Appeals for the Third Ciruit

[Title omitted.]

Answer to petition

Filed Nov. 22, 1934

The United States of America, by Harlan Besson, United States attorney, by way of answer to the petition of the alleged claimant, Frank Rizzo, above named, respectfully shows:

1. The allegations of paragraphs 1, 2, 3, 4, 5, 6, 7, 8, and 9 are admitted, except that such admission shall not be construed in any way as a recognition of the status of Frank Rizzo as a claimant to the alcohol in question.

2. The allegations of paragraphs 10, 11, 12, and 13 are neither admitted nor denied as the respondent has no knowledge thereof, except such information as is contained in the allegation of the petition filed herein, to which this is an answer.

OBJECTIONS IN POINT OF LAW

1. This court has no jurisdiction to grant the prayer of the petitioner. It has already been decided in a case entitled "The Winnie", 61 F. (2d), 516, that on an application for the release of a vessel made after an appeal from judgment, upon authority of title 28,

U. S. C., § 751, the court had no jurisdiction to grant the release of the vessel, but that the jurisdiction to do so lay with the trial court. The only jurisdiction which the United States District Court for the District of New Jersey had to deal with the subject matter of the seizure was that granted to it by Congress under the provisions of § 751, title 28, U. S. C. This section was amended June 19, 1934, by chapter 656, § 1, 48 Stat., to include the following language:

"Notwithstanding the provisions of this section or any other provisions of law relating to the return on bond of vessels seized for the violation of any law of the United States, the court having jurisdiction of the subject matter, may, in its discretion and upon good cause shown by United States, refuse to order such return of any such vessel to the claimant thereof."

The United States District Court for the District of New Jersey has no jurisdiction whatever to direct the sale of the seized alcohol and, up to the time of the repeal of the 18th amendment, had no power even to authorize its release upon bond, because the prosions of § 751, title 28, U. S. C., were in conflict with the provisions of the National Prohibition Act. It is evident from the foregoing that this court has no jurisdiction to act in the premises.

521 2. Frank Rizzo has no status whatever in the United States District Court to obtain any release of the seized alcohol on bond, because the court does not recognize him as a claimant in the matter.

3. The removal of the alcohol from the vessel "Doris" is a matter foreign to the rights of the petitioner Rizzo, and is a question which will have to be settled by the United States District Court and the United States marshal for the district of New Jersey, acting under the direction of the said court.

Respectfully submitted.

UNITED STATES OF AMERICA,
By HARLAN BESSON,
United States Attorney.

[File endorsement omitted.]

In United States Circuit Court of Appeals for the Third Circuit

[Title omitted.]

Order directing sale, etc.

Filed Nov. 22, 1934

This matter having been opened to the court by Harry H. Weinberger, of the firm of Minturn & Weinberger, proctors of Frank Rizzo, claimant-appellant, and Harlan Besson, United States attorney appearing for the United States of America, as libellant-appellee; and it appearing to the court that a petition is now pending

before this honorable court for a rehearing of the above-entitled cause, and that Honorable Philip Forman, United States District Court judge, questioned his right and authority to make an order directing the United States marshall to sell the 146,157 gallons of alcohol in his custody pending the final decision of this court of said pending application for rehearing; and it further appearing that the Matoil Service & Transport Company, the owner of the barge "Doris", now in the possession of the United States marshal, has sold the same to Chester A. Poling, Inc., and demand is being made for possession of the said barge with the result that litigation may ensue and the Matoil Service & Transport Company subjected to the payment of substantial damages for failure to deliver said barge; and it further appearing that Frank Rizzo, the claimant, is also threatened with suit because of the nondelivery of the said barge "Doris"; and it further appearing that the said Frank Rizzo, the claimant, is desirous of having the said 146,157 gallons of alcohol sold and the cash realized from the sale deposited in the registry of the United States District Court for the District of New Jersey to await the disposition of said pending application; and it further appearing that it is uncertain as to just when this litigation may
522 be finally determined and that considerable damage by leakage, cost of insurance and protection may be sustained and considerable time may elapse with the result that substantial damage and injury will be suffered by the Matoil Service & Transport Company, and/or Frank Rizzo and/or The United States of America, as well as Chester A. Poling, Inc.; Now, upon motion of Harry H. Weinberger, of the firm of Minturn & Weinberger, proctors for the claimant, in the presence of Harlan Besson, United States district attorney, appearing for the Government; it is

Ordered, that the United States marshal for the district of New Jersey, shall offer for sale at public auction, to the highest bidder, subject to confirmation by this court, the 146,157 gallons of alcohol, the subject matter of this cause, and deposit the proceeds thereof in the registry of the United States District Court of New Jersey, to await the disposition of the pending application for rehearing, and it is

Further ordered that the said sale by the United States marshal for the district of New Jersey be held within twelve (12) days hereof and confirmation be had before this court on the 10th day of December 1934, at ten o'clock in the forenoon, or as soon thereafter as counsel can be here; and it is

Further ordered, adjudged, and decreed, that said proceeds of sale so deposited in the registry of this court, shall be substituted in the place and stead of said 146,157 gallons of alcohol, and that all further proceedings herein shall be against said proceeds of sale;

Exception is hereby noted to the making and entry of the foregoing order by Harlan Besson, United States attorney for the dis-

trict of New Jersey, on the ground that said order is not within the jurisdiction of the court. That said exception is hereby signed and sealed accordingly.

JOSEPH BUFFINGTON, (L. S.)
Circuit Judge.

PHILADELPHIA, *November 22, 1934.*
[File endorsement omitted.]

In United States Circuit Court of Appeals for the Third Circuit

[Title omitted.]

Order to marshal

Filed Nov. 28, 1934

This matter being opened to the court by Harlan Besson, United States attorney for the district of New Jersey, and it appearing that application has been made by certain persons who desire to make bids at the published public sale of the alcohol seized pursuant
523 to process issued in the above-named cause, to secure samples of such alcohol not to exceed one pint from each of the containers on the barge "Doris", where the said alcohol is presently stored, in order that they may bid more intelligently at the time of the sale thereof;

It is thereupon ordered that the United States marshal for the district of New Jersey be, and he hereby is, authorized to issue samples in his discretion to responsible bidders, not to exceed one pint of alcohol from each of the containers on the said barge "Doris."

J. WARREN DAVIS,
Judge U. S. Circuit Court of Appeals for the Third Circuit.

Dated: November 28, 1934.
[File endorsement omitted.]

In United States Circuit Court of Appeals for the Third Circuit

[Title omitted.]

Order fixing terms of sale

Filed Dec. 4, 1934

This matter being opened to the court by Harlan Besson, United States attorney for the district of New Jersey, in the presence of David V. Cahill and L. Y. Ray, Special Assistants to the Attorney General of the United States, and Samuel Cohen, legal advisor to Alcohol Tax Unit, appearing for the appellee and Harry Weinberg and Louis Halle appearing for the appellant, and it appearing that a dispute has arisen as to the terms of pendente lite of the res in

this cause and the court having heard the argument of counsel and directed an agreement as to such terms, and the annexed terms of sale having been presented in open court as representing the terms of sale agreed upon;

It is on this 4th day of December, A. D. 1934, ordered, adjudged, and decreed, that the United States marshal in and for the district of New Jersey conduct the sale pendente lite of the res in this cause pursuant to the terms of sale hereto annexed.

PER CURIAM,
BUFFINGTON, *J.*
Senior Circuit Judge.

TERMS OF SALE OF 146,157 GALLONS OF ALCOHOL

Pursuant to order of the United States Circuit Court of Appeals for the Third Circuit made on November 22, 1934, in Case No. 5247, Oct. term, 1933, entitled Frank Rizzo, claimant, etc., appellant, vs. United States of America, libellant-appellee.

524 Sale to be held December 8, 1934, at North Seaboard Terminal, Port Newark, N. J.

This sale is made pursuant to an order of the United States Circuit Court of Appeals for the Third Circuit, dated November 22nd, 1934. The terms and conditions under which the sale will be conducted, are as follows:

1. The sale will be by public auction to the highest bidder and will be held at the North Seaboard Terminal, Port Newark, N. J., at twelve o'clock noon, December 8, 1934.

2. The alcohol to be sold comprising 146,157 gallons, is the cargo of the barge "Doris."

3. The cargo of alcohol which is being sold is to be sold free and clear of all claims of any kind or character but subject to the approval and confirmation of the sale by the United States Circuit Court of Appeals for the Third Circuit.

4. The alcohol will be offered for sale at the highest price bid per wine gallon.

5. The approximate number of gallons offered for sale has been stated above, but the exact amount actually sold, will be determined immediately after the sale by Government gauger and his report of the amount of alcohol will fix the total amount of the purchase price and will be in all respects final and binding upon the purchaser.

7. 25% of the estimated total purchase price based upon the estimate of 146,157 gallons of alcohol must be paid in cash or by certified check to the undersigned by the successful bidder immediately upon the close of the bids. The quantity of alcohol will be gauged immediately by Government gauger as heretofore stated, and upon the completion of the gauging as heretofore stated, and within thirty days after the date of sale, the purchaser must pay as set forth in the beginning of this paragraph, the total balance shown thereby to be due.

8. The undersigned makes no representations or guaranty of the alcohol as to quality, proof, or otherwise.

9. The cargo will be offered for sale in lots of 10,000 gallons, the residue above the 10,000-gallon lots to be sold separately. Bids covering the entire cargo will also be received. Bids may be received for the entire cargo and if the offer for the cargo exceeds the total of the bids for the separate lots, the highest bid for the entire cargo will be accepted.

10. The sale is made, as heretofore stated, pursuant to the order of the United States Circuit Court of Appeals for the Third Circuit and is subject to confirmation by that court on December 10, 1934.

F. C. SCHNEIDER, *U. S. Marshal.*

Dated: Trenton, N. J.
[File endorsement omitted.]

525 In United States Circuit Court of Appeals for the Third Circuit

[Title omitted.]

Order denying petition for rehearing

Filed Dec. 5, 1934

And now, to wit, December 5, 1934, after due consideration, the petition for rehearing in the above-entitled case is hereby denied.

Philadelphia.

PER CURIAM,
BUFFINGTON,
Circuit Judge.

[File endorsement omitted.]

In United States Circuit Court of Appeals for the Third Circuit

[Title omitted.]

Marshal's report of sale

Filed Dec. 11, 1934

To the Honorable the Judges of the United States Circuit Court of Appeals for the Third Circuit:

As per order dated November 22nd, 1934, signed by Hon. Joseph Buffington, senior circuit judge, sale of 146,157 gallons of alcohol on board the barge "Doris" was advertised for sale at public auction, at the North Seaboard Terminal, Port Newark, New Jersey, on Monday, December 3rd, at 12 o'clock noon, on which date prior to sale I received an order from Hon. J. Warren Davis, judge of the United States Circuit Court of Appeals for the Third Circuit,

wherein directed that said sale be adjourned until Saturday, December 8th, 1934, at same place and time.

In compliance with order fixing terms of sale issued December 4th, A. D. 1934, signed by Hon. J. Buffington, senior circuit judge, I did on Saturday, December 8th A. D. 1934 at 12 o'clock noon offer for sale at public auction to the highest bidder the 146,157 gallons of alcohol on board the barge "Doris" in lots of 10,000 gallons, the highest and best price that same would bring was fifty cents (50¢) per
526 wine gallon, after which the entire cargo was offered for sale and sold to: Reo Distillers, Inc., 276 Jelliff Avenue, Newark New Jersey, for the sum of one dollar and eighty-five cents ($1.85) per wine gallon, and being the highest and best price that same would bring in cash at the time of sale.

In accordance with terms of sale contained in order I received in payment 25% of the purchase price or seven ten-thousand-dollar certified checks.

Respectfully submitted this tenth day of December A. D. 1934.

F. C. SCHNEIDER,
United States Marshal for District of New Jersey.

[File endorsement omitted.]

In United States Circuit Court of Appeals for the Third Circuit

[Title omitted.]

Order of confirmation of sale

Filed Dec. 11, 1934

This matter being opened to the court by Harry H. Weinberger, of Minturn & Weinberger, proctors of the claimant-appellant, in the presence of Harlan Besson, Esq., David Cahill, Esq., and Lucian B. Ray, Esq., proctors appearing in behalf of the United States of America, libellant-appellee, and it appearing to the court that a sale was duly held on December 8, 1934, at twelve o'clock, by F. C. Schneider, the United States marshal for the judicial district of New Jersey, under and by virtue of certain orders heretofore made by the court on November 22, 1934, and December 4, 1934, respectively; and

It further appearing that the United States marshal struck off said spirits consisting of approximately 146,157 gallons of alcohol at public auction to the highest bidder at and after the rate of $1.85 per wine gallon, the exact amount sold to be determined by the Government gager, and the amount due for such spirits as and for the purchase price to be based on said gaging; and

It further appearing that the purchaser or successful bidder at said sale, the Reo Distilleries, Inc., did upon the close of the bids pay by certified checks as a deposit twenty-five percent of the estimated total purchase price based upon the estimate of 146,157 gallons, to Frederick C. Schneider, the United States marshal, subject to the conditions and terms of sale; and

It further appearing that the said spirits was struck off to the highest bidder free and clear of all claims of any kind and character, and in particular—

527 (a) Free of all Government taxes or tax liens of any kind or character;

(b) Free of any and all custom duties; and

It further appearing to the court that said cargo of spirits or alcohol was by judgment entered on October 2, 1934, adjudicated the property of the claimant free of any claim of the United States of America, and that thereafter a petition for rehearing was applied for by the United States of America and subsequently denied; and

It further appearing to the court that said sale conducted in pursuance of the orders made by this court contain provision that said sale was to be made subject to the approval of this court, as well as its confirmation, and the matter of confirmation now being moved, the court upon careful consideration of the arguments and briefs advanced and submitted in behalf of claimant-appellant and the libellant-appellee, respectively, as well as the report of sale submitted by Frederick C. Schneider, the United States marshal;

It is on this 11th day of December 1934 ordered, adjudged, and decreed that said sale to the Reo Distilleries, Inc., the successful bidder, is hereby in all respects ratified and confirmed; and

It is further ordered that Frederick C. Schneider, the United States marshal for the judicial district of New Jersey, execute and deliver upon payment of the purchase price the cargo of spirits or alcohol consisting of the exact amount as may be gauged by the official gauger all necessary assurances—

(a) Free and clear of and from any and all claims of any kind or character;

(b) Free of all Government taxes or tax liens of any kind or character;

(c) Free of all custom duties;

and that the said alcohol or spirits intended for beverage purposes shall be treated by the United States Government and any of its departments as tax paid, irrespective of the lack of any stamp or tax certificate affixed thereto on the respective containers in which said alcohol may be deposited or contained. To effectuate such purpose the said Frederick C. Schneider, United States marshal, shall affix thereto under his seal an appropriate statement to said effect; and

It is further ordered, that the said United States marshal execute and deliver all necessary assurances to the said Reo Distilleries, Inc., or their assigns, which may be required to convey title to said cargo of spirits or alcohol so as to effectuate the terms of this order; and

It is further ordered, that the said Frederick C. Schneider, United States marshal, deposit the purchase price received for said cargo in the registry of this court in said cause.

PER CURIAM,
BUFFINGTON, *C. J.*

Exception is hereby noted to the making and entry of the foregoing order by Harlan Besson, United States attorney for the district of New Jersey, on the ground that said order is not within
528 the jurisdiction of the court. That said exception is hereby signed and sealed accordingly.

(S) JOSEPH BUFFINGTON,
Senior U. S. Circuit Judge.

[File endorsement omitted.]

In United States Circuit Court of Appeals for the Third Circuit

[Title omitted.]

Order to move vessel with contents

Filed Dec. 13, 1934.

Application having been made by Reo Distillers, Inc., through its attorney, Samuel I. Kessler, Esquire, for permission to remove the vessel "Doris", containing the cargo of 160,000 gallons of spirits, now in the custody of the United States marshal for the district of New Jersey, located at Port Newark, to a private dock on the Passaic River, located at Passaic and Clay Streets in the city of Newark, where said cargo can be more conveniently unloaded; and good cause being shown therefor, it is thereupon on this 13th day of December 1934.

Ordered, that said application be granted and that W. B. Snowden, Deputy United States marshal for the district of New Jersey, be, and he is hereby, authorized to move said vessel and cargo from its present location at Port Newark to the private dock on the Passaic River on Passaic and Clay Streets in the city of Newark; and it is further

Ordered, that the risk of moving same and the cost to convey said vessel and cargo shall be borne by the applicant, Reo Distillers, Inc.

PER CURIAM,
BUFFINGTON,
United States Circuit Judge.

[File endorsement omitted.]

529 In United States Circuit Court of Appeals

Assignment by Rizzo to Halpern

Filed Jan. 24, 1935.

Know all men by these presents, that I, Frank Rizzo, of the City of Bayonne, County of Hudson, and State of New Jersey, on December 8th, 1934, for and in consideration of the sum of One ($1.00) Dollar and other good and valuable considerations, the

receipt whereof is hereby acknowledged have sold, and by these presents do sell, grant, assign, convey, transfer, set over, and deliver unto Hyman Halpern, of Newark, New Jersey, the sum of Fifty One Thousand Dollars ($51,000.00), out of the monies and proceeds that may be due me or declared to be due me in the cause wherein I am claimant and the United States of America is Libellant.

To have and to hold the same unto the said Hyman Halpern, his executors, administrators, and assigns forever, to and for the use of the said Hyman Halpern, hereby constituting and appointing Hyman Halpern my true and lawful attorney, irrevocable in my name, place, and stead, for the purposes aforesaid, to ask, demand, sue for, attach, levy, recover, and receive all such *such* and sums of money which now are or may hereafter become due, owing and payable for, or on account of all or any of the accounts, dues, debts, and demands above assigned or in the cause now pending in the United States Circuit Court of Appeals for the Third Circuit or the Court to which same may be remanded, and I hereby give to the said Hyman Halpern, his executors, administrators, and assigns full power and authority for his or their use and at his or their cost, to ask, demand, collect, receive, compound, and give acquittance for the same or any part thereof, and in my name or otherwise to prosecute and withdraw any suits or proceedings at law or in equity thereof.

530 In witness whereof, the party of the first part has set his hand and seal the day and year first above written.

FRANK RIZZO [L. S.]

Signed, sealed, and delivered in the presence of John J. Budd, An Attorney at Law of New Jersey.

STATE OF NEW JERSEY,
County of Essex, ss.

Be it remembered, that on this 8th day of December, in the year One Thousand Nine Hundred and Thirty-four, before me, the subscriber, personally appeared Frank Rizzo, who I am satisfied is the assignor mentioned in the within Instrument, to whom I first made known the contents thereof, and thereupon he acknowledged that he signed, sealed, and delivered the same as his voluntary act and deed, for the uses and purposes therein expressed.

JOHN J. BUDD,
An Attorney at Law of New Jersey.

[File endorsement omitted.]

531 In United States Circuit Court of Appeals

Assignment by Rizzo to Weinberger et al.

Filed Jan. 24, 1935

Know all men by these presents, that I, Frank Rizzo, of the City of Bayonne, County of Hudson, and State of New Jersey, on De-

cember 8th, 1934, for and in consideration of the sum of One ($1.00) Dollar, and other good and valuable considerations, the receipt whereof is hereby acknowledged, have sold, and by these presents do sell, grant, assign, convey, transfer, set over, and deliver unto Joseph J. Weinberger, attorney, Kessler and Kessler, attorneys and Louis Halle, attorney, jointly, the sum of One Hundred Seventy Thousand Dollars ($170,000.00) out of the moneys and proceeds that may be due me or declared to be due me in the cause wherein I am claimant and the United States of America is libellant.

To have and to hold the same unto the said Joseph J. Weinberger, attorney, Louis Halle, attorney and Kessler and Kessler, attorneys, their executors, administrators and assigns forever, to and for the use of Joseph J. Weinberger, attorney, Kessler and Kessler, attorneys and Louis Helle, attorney, jointly, hereby constituting and appointing Joseph J. Weinberger, Kessler, and Kessler and Louis Halle, my true and lawful attorneys irrevocable in my name, place and stead, for the purposes aforesaid, to ask, demand, sue for, attach, levy, recover, and receive all such sum and sums of money which now are or may hereafter become due, owing and payable for, on or account of all or any of the accounts, dues, debts, and demands above assigned or in the cause now pending in the United States Circuit Court of Appeals for the Third Circuit, or the Court to which same may be remanded, and I hereby give to the said Joseph J. Weinberger, attorney, Kessler and Kessler, attorneys, and Louis Halle, attorney, their executors, administrators and assigns full power and authority

for their own use and at their cost to ask, demand, collect,
532 receive, compound and give acquittance for the same or any part thereof, and in my name or otherwise to prosecute and withdraw any suits or proceedings at law or in equity thereof.

In witness whereof, the party of the part has set his hand and seal the day and year first above written.

FRANK RIZZO [L. S.]

Signed, sealed, and delivered in the presence of John J. Budd, An Attorney at Law of New Jersey.

STATE OF NEW JERSEY,

County of Essex, ss.

Be it remembered, That on this 8th day of December in the year One Thousand Nine Hundred and Thirty-four, before me, the subscriber, personally appeared Frank Rizzo, who, I am satisfied is the assignor mentioned in the within Instrument, to whom I first made known the contents thereof, and thereupon he acknowledged that, he signed, sealed and delivered the same as his voluntary act and deed, for the uses and purposes therein expressed.

JOHN J. BUDD,

An Attorney at Law of New Jersey.

[File endorsement omitted.]

[Copy]

533 In United States Circuit Court of Appeals for the Third Circuit

[Title omitted.]

Petition by the United States of America for lien for taxes

Filed Feb. 2, 1935

To the Honorable the Judges of the Circuit Court of Appeals for the Third Circuit:

The Petition of the United States of America, by Harlan Besson, United States Attorney for the District of New Jersey, respectfully shows:

1. That on December 12, 1932, customs officers seized three vessels, the "Doris", the "Evelyn", and the "Helen." The "Doris" was carrying a cargo of alcohol estimated to be 146,157 gallons and there were negligible quantities of alcohol in the other vessels. Shortly thereafter in the District of New Jersey libels were filed against each of the vessels and against the cargoes, and in each case forfeiture was sought for violation of § 584 of the Tariff Act of 1930, § 594 of the Tariff Act of 1930, paragraph 814 of the Tariff Act of 1930, and § 4377 of the Revised Statutes of the United States (violation of the terms of their licenses). In the amended libels filed the United States alleged that § 4377 of the Revised Statutes had been violated by reason of transportation and possession in violation of the provisions of § 3, T. 2, of the National Prohibition Act. The District Court declared the vessels forfeited for violation of § 4377 of the Revised Statutes, and in its final decrees ordered the vessels sold (R. 104, 124, 85).

2. This Honorable Court on August 16, 1934, entered its decree reversing the District Court and ordered that the vessels be re-
534 turned to the claimant, or in the event of sale, that the proceeds be given to him. An application for a writ of certiorari was made by the Government as No. 410, Supreme Court, 1934 Term, and certiorari was denied.

3. That an order was entered in the District Court consolidating for hearing the proceedings involving the vessels and the cargoes, but this Honorable Court considered the appeals relative to the vessels and the cargo of the "Doris" separately, and while a petition for rehearing was pending in this Honorable Court, and while this cause was decided adversely to the United States of America by opinion filed on October 2, 1934, application was made by the proctors for the claimant-appellant for an order directing the sale of the 146,157 gallons of alcohol, which is the subject matter of the cause, to the end that the proceeds thereof might be deposited in the registry of the court. This order was granted and the sale directed,

and thereafter on December 8, 1934, the sale of the alcohol was held, and on December 11, 1934, the order of sale was confirmed by this Honorable Court. The pertinent parts of the order of confirmation of sale are as follows:

"It is on this 11th day of December 1934, ordered, adjudged, and decreed that said sale to the Reo Distillers, Inc., the successful bidder, is hereby in all respects ratified and confirmed; and

"It is further ordered that Frederick C. Schneider, the United States Marshal for the Judicial District of New Jersey, execute and deliver upon payment of the purchase price the cargo of spirits or alcohol consisting of the exact amount as may be gauged by the official gauger all necessary assurances

(a) Free and clear of and from any and all claims of any kind or character;

(b) Free of all Government taxes of tax liens of any kind or character;

535 (c) Free of all customs duties; and that the said alcohol or spirits intended for beverage purposes shall be treated by the United States government and any of its departments tax paid, irrespective of the lack of any stamp or tax certificate affixed thereto on the respective containers in which said alcohol may be deposited or contained. To effectuate such purpose the said Frederick C. Schneider, United States Marshal, shall affix thereto under his seal an appropriate statement to said effect; and

"It is further ordered that the said United States Marshal execute and deliver all necessary assurances to the said Reo Distillers, Inc., or their assigns, which may be required to convey title to said cargo of spirits or alcohol so as to effectuate the terms of this order; and

"It is further ordered that the said Frederick C. Schneider, United States Marshal, deposit the purchase price received for said cargo in the Registry of this Court in said cause."

4. That said alcohol was sold for the sum of $1.85 per wine gallon, and 25% of the purchase price was deposited with the United States Marshal for the District of New Jersey.

5. That the alcohol involved in the cargo of the "Doris", which formed the subject matter of Rizzo's claim, has been found by chemical test to be 192 proof; that § 900 of the Revenue Act of 1926, as amended by the Revenue Act of 1934, commonly known as the Liquor Taxing Act, provides for a basic tax of $2 per proof gallon; that no tax of any kind has ever been paid upon the said alcohol to the United States of America or any of its governmental agencies, and that there is now due and owing as Internal Revenue tax upon the said 146,157 gallons of alcohol the sum of $3.84 per proof gallon.

6. That the United States Supreme Court, in the case of U. S. vs. Thompson, 142 U. S., 471, and in the case of U. S. v. One Ford Coupe, 272 U. S., 321, held that the basic Internal Revenue tax above

mentioned attaches to the property as soon as it comes into existence and may only be discharged by the destruction of the property or by payment; § 3289 R. S., Title 26, § 265, U. S. C., provides as follows:

"All distilled spirits found in any cask or package containing five (5) gallons or more without having thereon each
536 mark and stamp required by law shall be forfeited to the United States."

For the purpose of calculating the amount of the Internal Revenue tax due on distilled spirits and facilitating its collection, Congress has created an entire system. § 3247, Revised Statutes, defines the distiller; § 3248, Revised Statutes, defines distilled spirits; § 3249, Revised Statutes, provides for gauging and measuring; § 3251, Revised Statutes, as amended, designates the amount of the tax; and § 3289, Revised Statutes, provides for the forfeiture of unstamped distilled spirits.

7. That your petition has a lien for taxes aforesaid on the proceeds of the sale, now paid into the registry of this court or to be paid into the registry of this court, in conformity with the terms of the order of sale hereinbefore mentioned, which lien arises out of the right of the United States of America to collect the basic tax which attached to the alcohol when it came into existence, and existed as a lien against it until the tax was paid.

8. That the gallonage of alcohol under seizure, when gauged in terms of proof gallons, as set forth in the affidavit of Charles V. Duffy, Esq., Collector of Internal Revenue for the Fifth Collection District of New Jersey, hereto annexed and made part hereof, and for better identification marked "Appendix A", was found to be 276,113.40 proof gallons, on the basis of wine gallons of approximately 192 proof; that the said gallonage being subject to a tax of $2 per gallon on each proof gallon, as provided by the Act of Congress of January 11, 1934, ch. 1, section 1, subsection 4, 1934 Session Laws, 73rd Congress, 2nd Session, the amount of tax due and owing upon the said alcohol is $552,226.80.

9. That on the 5th day of December 1934 this Honorable Court denied the petition for rehearing on behalf of the libellant-
537 appellee, and that prior thereto, by the provisions of the original opinion of this Court filed in this cause on October 2, 1934, as heretofore alleged, it was decided as follows:

"Accordingly the decrees forfeiting the 146,157 gallons of alcohol are reversed with directions to dismiss the libels filed herein and discharge the alcohol from the custody of the United States District Court and return it, or the proceeds of the sale, if sold, to the claimant."

10. That on the day that the order for confirmation of the sale of said alcohol was presented to this Honorable Court, it was the understanding of the United States Attorney, appearing on behalf of the petitioner herein, that the question of the lien of the tax hereinbefore

described upon the fund accruing from the sale of the said alcohol, would be considered by this Court before any payment was made out of the registry of this Court; that the determination of this Court in its opinion of October 2, 1934, which would of necessity be expressed in its mandate, is of no avail because of the changed situation, inasmuch as the proceeds of the sale of the alcohol have come to the hands of this Honorable Court, and neither the alcohol nor the proceeds of the sale thereof are in the custody of the United States District Court for the District of New Jersey.

11. That the tax created by the provisions of § 235 of Title 26, U. S. C., as amended, applies to all distilled spirits whether they are produced in the United States or imported into the United States.

Whereupon your petitioner respectfully prays that the lien of the United States of America for the sum of $552,226.80 for taxes due as aforesaid upon the seized alcohol, be declared a lien upon the proceeds of the sale of said alcohol, now either paid or about to be paid into the registry of this Court, and that this Honorable Court direct that the fund forming the proceeds of the sale of the
538 said seized alcohol be paid over to the Treasury of the United States of America, or to the Collector of Internal Revenue of the Fifth Collection District of New Jersey, in satisfaction of the tax due on said alcohol, and your petitioner will ever pray, etc.

UNITED STATES OF AMERICA,
By Harlan Besson,
HARLAN BESSON,
United States District Attorney
for the District of New Jersey.

539 *Appendix A*

STATE OF NEW JERSEY,
County of Essex, ss:

Charles V. Duffy, being duly sworn upon his oath according to law, deposes and says:

I am the Collector of Internal Revenue for the Fifth Collection District of New Jersey. On the 11th day of December 1934 an order was entered in the United States Circuit Court of Appeals for the Third Circuit, Frank Rizzo, claimant, against the United States, Appellee, confirming the sale of approximately 146,157 gallons of alcohol at public auction to the Reo Distilleries, Inc., at and after the rate of $1.85 per wine gallon, the exact amount sold to be determined by the Government gauger and the amount due for such spirits as and for the purchase price to be based on the said gauging.

The said alcohol was the cargo of the barge "Doris", which barge, together with its cargo, was seized at Port Johnson, in the City of Bayonne, Hudson County, N. J., and was in the Fifth Collection Dis-

trict of New Jersey, on December 12, 1932, by Customs Agents and Coast Guards in the service of the United States of America, and subsequently libeled by the United States District Attorney for the District of New Jersey, and seized by the United States Marshal upon monition issued pursuant to libel filed against the said cargo; that prior to said seizure no tax in any form whatsoever had been paid on the said cargo of alcohol to the Collector of Internal Revenue for the Fifth Collection District of New Jersey as disclosed by the records of my office; that while said cargo of alcohol was in the custody of the United States Marshal in and for the District of New Jersey, pursuant to the monition issued out of the United States District Court for the District of New Jersey, the said cargo of alcohol was gauged, the result of the gauging showing that the cargo amounted to 276,113.40 proof gallons, upon which a total tax of $552,226.80 is due to the Government, no part of which has been paid to my office. The said alcohol is now stored in drums, commonly known as 50-gallon drums, in this collection district, and stamps showing payment of taxes have not been issued for the said drums of alcohol by me, nor have I received request for or money for such stamps, nor has any part of the tax due on the said alcohol been paid in this district.

Charles V. Duffy,
CHARLES V. DUFFY,
Collector of Internal Revenue,
Fifth Collection District of New Jersey.

Subscribed and sworn to before me this 31st day of January 1935.

[SEAL] ELOISE I. DONOHUE,
Notary Public.

Comm. expires 8/18/38.
[File endorsement omitted.]

540 In United States Circuit Court of Appeals for the Third Circuit

[Title omitted.]

Minute entry of hearing on distribution of proceeds of marshal's sale

And afterwards, to wit, on the 2d day of April 1935 come the parties aforesaid by their counsel aforesaid, and this case being called for hearing on appellant's motion for an order on the clerk of this court to pay over the proceeds of sale of the alcohol in question to the claimants; and upon the petition of the Government praying for payment of Federal taxes out of the proceeds of said sale, before the Honorable Joseph Buffington, Honorable J. Warren Davis, and Honorable J. Whitaker Thompson, Circuit Judges, and the court not being fully advised in the premises, takes further time for the consideration thereof.

[Copy]

541 Form 668–A. Treasury Department. Internal Revenue Service. Revised Nov. 1933.

Notice of levy

UNITED STATES OF AMERICA,
First Collection District, State of New Jersey.

To CLERK OF THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, at Philadelphia, Pa.:

You are hereby notified that there is now due, owing, and unpaid from Frank Rizzo, Port Johnson, New Jersey, to the United States of America the sum of five hundred fifty-two thousand, two hundred twenty-six dollars and eighty cents ($552,226.80), as and for an internal revenue tax.

You are further notified that all property, rights to property, moneys, credits, and/or bank deposits now in your possession and belonging to the aforesaid Frank Rizzo, and all sums of money owing from you to the said Frank Rizzo, are hereby seized and levied upon for the payment of the aforesaid tax, together with penalties and interest, and demand is hereby made upon you for the sum of five hundred fifty-two thousand, two hundred twenty-six dollars and eighty cents ($552,226.80) of the amount now owing from you to the said Frank Rizzo, or for such lesser sum as you may be indebted to him, to be applied in payment of the said tax liability.

Dated at Camden, New Jersey, this 20th day of April 1935.

HARRY L. MALONEY,
Collector of Internal Revenue.

(Endorsements:) Received & filed Apr. 22, 1935. Wm. P. Rowland, clerk.

542 Received April 22nd, 10:00 a. m., 1935.

(Signed) JOHN P. KELLY,
Deputy Clerk United States Circuit Court of Appeals for the Third Circuit.

Served at 10:00 a. m. Apr. 22n, 1935.

J. E. JACKSON,
Dep. Coll. of Internal Revenue.

[Copy]

543 *Warrant for distraint*

No. 28972

Form 69. Treasury Department. Internal Revenue Service. Revised March 1933.

Balance forward	Date	Charge	Last credit	Unpaid balance	Account number and remarks
	4/19/35	$552,226.80		$552,226.80	Period 12-12-32. 12-8-34. Apr. 1935, No. P-O, L-O

Frank Rizzo, Port Johnson, New Jersey.	Date of first notice: 4-20-35. Date of second notice: ——	

To——————————, *Deputy Collector.*

Whereas, in pursuance of the provisions of the acts of Congress relating to internal revenue the above-named person or persons is, or are, liable to pay the tax or taxes assessed against him, or them, in the amount or amounts named hereinbelow, together with penalties and interest prescribed by law for failure to pay said tax or taxes when the same became due; and whereas, ten days have elapsed since notice was served and demand made upon said person or persons for payment of said tax or taxes; and whereas, said person or persons still neglect or refuse to pay the same: You are hereby commanded to levy upon, by distraint, and to sell so much of the goods, chattels, effects, or other property or rights to property, including stocks, securities, and evidences of debt, of the person or persons liable as aforesaid, or on which a lien exists for the tax or taxes, as may be necessary to satisfy the tax or taxes, with such additional amounts, including interest, as are shown in the statement below, and also such further sum as shall be sufficient for the fees, costs, and expenses of the levy; but if sufficient goods, chattels, or effects are not found, then you are hereby commanded to seize and sell in the manner prescribed by law so much of the real estate of said person or persons, or on which a lien exists for the tax or taxes, as may be necessary for the purposes aforesaid. You will do all things necessary to be done in the premises and strictly comply with all requirements of law, and for so doing this shall be your warrant, of which make due return to me at this office on or before the sixtieth day after the execution hereof. Tax on 276,113.40 p. gal. alcohol @ $2.00 per p. gal. under sec. 2 L. T. A. 1934 included in which is tax at rate of $1.10 p. gal. imposed by sec. 900 R. A. 1926.

Unpaid balance, $552,226.80.

Penalty of 5 per centum.

Total tax, penalty, and interest due on date of second notice, $552,226.80.

Witness my hand and official seal at Camden, New Jersey, this 20th day of April, 1935.

[SEAL.] (Signed) HARRY L. MALONEY,
Collector of Internal Revenue.

Internal Revenue Collection District of 1st N. J.

544 *Notice of tax lien under internal-revenue laws*

Form 668, revised Oct. 1928. Treasury Department. Internal Revenue Service.
No. 1793 (29777) Dis. Court No.

UNITED STATES INTERNAL REVENUE,
1st District of New Jersey, April 20th, 1935.

Pursuant to the provisions of section 3186 of he Revised Statutes of the United States, as amended by section 613 of the Revenue Act of 1928 (Act of May 29, 1928, 45 Stat., 875), notice is hereby given that there have been assessed under the Internal Revenue laws of the United States against the following-named taxpayer, taxes (including penalties) which after demand for payment thereof remain unpaid, and that by virtue of the above-mentioned statute the amount of said taxes, together with interest, penalties, and costs that may accrue in addition thereto, is a lien in favor of the United States upon all property and rights to property belonging to said taxpayer, to wit:

Name of taxpayer, Frank Rizzo.

Residence or place of business, Port Johnson, New Jersey.

Nature of tax, 276,113.40 p. gal. alcohol at $2.00 per p. gal. under sec. 2, L. T. A. 1934 (included in which is the tax at rate of $1.10 per p. gal. imposed by sec. 900, R. A. 1926) period, 12–12–32, 12–8–34, April 1935 1st. Suppl. P–O, L–O.

Amount of tax assessed, $552,226.80.

Date assessment list received, 23–C dated April 19th, 1935.

(Signed) HARRY L. MALONEY,
Collector.

CERTIFICATE OF OFFICER AUTHORIZED BY LAW TO TAKE ACKNOWLEDGMENTS

STATE OF NEW JERSEY,
County of Camden, ss:

On this day personally appeared before me a notary public in and for the State and county aforesaid, Harry L. Maloney, collector of Internal revenue for the First District of New Jersey, to me well known as the person who executed the foregoing instrument, and

acknowledged that he executed the same for the purposes therein expressed.

In witness whereof I have hereunto set my hand and official seal this the 20th day of April 1935.

[SEAL] (Signed) H. R. HUNT,
Notary Public of New Jersey.

My comm. expires Dec. 8th, 1935.

To CLERK OF THE U. S. DISTRICT COURT,
Philadelphia, Pa.

545 No. —. United States. vs. ———— ———. Notice of tax lien.
Filed this 22nd day of April 1935.

(Signed) ROBERT T. PRESS,
Dep. Clerk (or Registrar).

EXCERPT FROM THE REVENUE ACT OF 1928

"SEC. 613. LIEN FOR TAXES. * * * SEC. 3186. (a) If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, penalty, additional amount, or addition to such tax, together with any costs that may accrue in addition thereto), shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person. Unless another date is specifically fixed by law, the lien shall arise at the time the assessment list was received by the collector and shall continue until the liability for such amount is satisfied or becomes unenforceable by reason of lapse of time.

"(b) Such lien shall not be valid as against any mortgagee, purchaser, or judgment creditor until notice thereof has been filed by the collector—

"(1) In accordance with the law of the State or Territory in which the property subject to the lien is situated whenever the State or Territory has by law provided for the filing of such notice; or

"(2) In the office of the clerk of the United States District Court for the judicial district in which the property subject to the lien is situated, whenever the State or Territory has not by law provided for the filing of such notice; or

"(3) In the office of the clerk of the Supreme Court of the District of Columbia, if the property subject to the lien is situated in the District of Columbia.

"(c) Subject to such regulations as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may prescribe, the collector of internal revenue charged with an assessment in respect of any tax—

"(1) May issue a certificate of release of the lien if the collector finds that the liability for the amount assessed, together with all interest in respect thereof, has been satisfied or has become unenforceable;

"(2) May issue a certificate of release of the lien if there is furnished to the collector and accepted by him a bond that is conditioned upon the payment of the amount assessed, together with all interest in respect thereof, within the time prescribed by law (including any extension of such time), and that is in accordance with such requirements relating to terms, conditions, and form of the bond and sureties thereon, as may be specified in the regulations;

"(3) May issue a certificate of partial discharge of any part of the property subject to the lien if the collector finds that the fair market value of that part of such property remaining subject to the lien is at least double the amount of the liability remaining unsatisfied in respect of such tax and the amount of all prior liens upon such property.

"(d) A certificate of release or of partial discharge issued under this section shall be held conclusive that the lien upon the property covered by the certificate is extinguished.

"(e) The Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may by regulation provide for the acceptance of a single bond, complying both with the requirements of section 272(j) of the Revenue Act of 1928 (relating to the extension of time for the payment of a deficiency), or of any similar provisions of any prior law, and the requirements of subsection (c) of this section.

"(f) Subsections (c), (d), and (e) of this section shall apply to a lien in respect of any internal-revenue tax, whether or not the lien is imposed by this section."

INSTRUCTIONS

Notice on this form should be filed as above provided and in accordance with instructions contained in Internal Revenue Circular of March 18, 1913. (T. D. 1841.)

All such notices should be numbered in consecutive order, and each Certificate of Discharge (Form 669), when issued should be given a number corresponding to that given the notice previously issued.

The filing of the notice, in each case, should be noted in the remarks column of the Assessment List, opposite the name of the taxpayer. For such purpose the serial number and date of issuance of the notice will be sufficient.

Upon payment of the assessed tax and all penalties, interest, and costs incurred (not including filing fees), a Certificate of Discharge (Form 669) should be at once issued, and filed with the proper filing officer.

All fees for filing are payable by the United States. Bills for the same should be rendered against the collector of internal revenue, who will make payment after authorization by the Commissioner of Internal Revenue.

[Copy]

546 Form 668, revised Oct. 1928. Treasury Department. Internal Revenue Service.

Notice of tax lien under internal revenue laws

No. 1793.

UNITED STATES INTERNAL REVENUE,
1st District of New Jersey, April 20th, 1935.

Pursuant to the provisions of section 3186 of the Revised Statutes of the United States, as amended by section 613 of the Revenue Act of 1928 (act of May 29, 1928, 45 Stat., 875), notice is hereby given that there have been assessed under the internal revenue laws of the United States against the following-named taxpayer, taxes (including penalties) which after demand for payment thereof remain unpaid, and that by virtue of the above-mentioned statute the amount of said taxes, together with interest, penalties, and costs that may accrue in addition thereto, is a lien in favor of the United States upon all property and rights to property belonging to said taxpayer, to wit:

Name of taxpayer, Frank Rizzo.

Residence or place of business, Port Johnson, New Jersey.

Nature of tax: 276,113.40 p. gal. alcohol, @ $2.00 per p. gal., under sec. 2, L. T. A. of 1934 (included in which is the tax at rate of $1.10 per p. gal. imposed by sec. 900 R. A. 1926). Period 12–12–32, 12–8–34, April 1935 list, 1st Supp. P–O, L–O.

Amount of tax assessed, $522,226.80.

Date assessment list received, April 19th, 1935, 23–C dated 4/19/35.

(Signed) HARRY L. MALONEY,
Collector.

CERTIFICATE OF OFFICER AUTHORIZED BY LAW TO TAKE ACKNOWLEDGMENTS

STATE OF NEW JERSEY,
County of Camden, ss:

On this day personally appeared before me a notary public in and for the State and county aforesaid, Harry L. Maloney, collector of internal revenue for the First District of New Jersey, to me well known as the person who executed the foregoing instrument, and acknowledged that he executed the same for the purposes therein expressed.

In witness whereof I have hereunto set my hand and official seal, this the 20th day of April 1935.

[SEAL] (Signed) H. R. HUNT,
Notary Public of N. J.

My comm. expires Dec. 8th, 1935.

To CLERK OF THE U. S. DISTRICT COURT,
Trenton, New Jersey.

547 No. 1593. United States vs. ------ ------ Notice of tax lien.

Filed this 22nd day of April 1935, at 9:05 a. m.

(Stamped) GEORGE T. CRANMER,
Clerk.

EXCERPT FROM THE REVENUE ACT OF 1928

"SEC. 613. LIEN FOR TAXES. * * * SEC. 3186. (a) If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, penalty, additional amount, or addition to such tax, together with any costs that may accrue in addition thereto), shall be a lien in favor of the United States upon all property and rights to property, whether real or personal belonging to such person. Unless another date is specifically fixed by law, the lien shall arise at the time the assessment list was received by the collector and shall continue until the liability for such amount is satisfied or becomes unenforceable by reason of lapse of time.

"(b) Such lien shall not be valid as against any mortgagee, purchaser, or judgment creditor until notice thereof has been filed by the collector—

"(1) In accordance with the law of the State or Territory in which the property subject to the lien is situated whenever the State or Territory has by law provided for the filing of such notice; or

"(2) In the office of the clerk of the United States District Court for the judicial district in which the property subject to the lien is situated, whenever the State or Territory has not by law provided for the filing of such notice; or

"(3) In the office of the clerk of the Supreme Court of the District of Columbia, if the property subject to the lien is situated in the District of Columbia.

"(c) Subject to such regulations as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may prescribe, the collector of internal revenue charged with an assessment in respect of any tax—

"(1) May issue a certificate of release of the lien if the collector finds that the liability for the amount assessed, together with all interest in respect thereof, has been satisfied or has become unenforceable;

"(2) May issue a certificate of release of the lien if there is furnished to the collector and accepted by him a bond that is condi-

tioned upon the payment of the amount assessed, together with all interest in respect thereof, within the time prescribed by law (including any extension of such time), and that is in accordance with such requirements relating to terms, conditions, and form of the bond and sureties thereon, as may be specified in the regulations;

"(3) May issue a certificate of partial discharge of any part of the property subject to the lien if the collector finds that the fair market value of that part of such property remaining subject to the lien is at least double the amount of the liability remaining unsatisfied in respect of such tax and the amount of all prior liens upon such property.

"(d) A certificate of release or of partial discharge issued under this section shall be held conclusive that the lien upon the property covered by the certificate is extinguished.

"(e) The Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may by regulation provide for the acceptance of a single bond, complying both with the requirements of section 272 (j) of the Revenue Act of 1928 (relating to the extension of time for the payment of a deficiency), or of any similar provisions of any prior law, and the requirements of subsection (c) of this section.

"(f) Subsections (c), (d), and (e) of this section shall apply to a lien in respect of any internal-revenue tax, whether or not the lien is imposed by this section."

INSTRUCTIONS

Notice on this form should be filed as above provided and in accordance with instructions contained in Internal Revenue Circular of March 18, 1913. (T. D. 1841.)

All such notices should be numbered in consecutive order, and each Certificate of Discharge (Form 669), when issued should be given a number corresponding to that given the notice previously issued.

The filing of the notice, in each case, should be noted in the remarks column of the Assessment List, opposite the name of the taxpayer. For such purpose the serial number and date of issuance of the notice will be sufficient.

Upon payment of the assessed tax and all penalties, interest, and costs incurred (not including filing fees), a Certificate of Discharge (Form 669) should be at once issued, and filed with the proper filing officer.

All fees for filing are payable by the United States. Bills for the same should be rendered against the collector of internal revenue, who will make payment after authorization by the Commissioner of Internal Revenue.

548 *Notice and demand for tax*

[Copy]

Form 17 (Rev. Aug. 1925). Treasury Department. Internal Revenue Service. ORIGINAL

Notice is hereby given that there has been assessed against you the amount of tax, penalty, and interest stated hereon. Demand is hereby made for immediate payment thereof. If payment is not made within ten days after date of this notice, the law provides that a penalty of 5 percent of the amount of the assessment will be added, plus additional interest on such assessment at the rate of 1 percent per month until paid: Date, Apr. 20th, 1935. To avoid further penalty and interest the amount stated on this notice must be paid to collector of internal revenue at Camden, New Jersey, within ten days from date stated above.	To the Collector of Internal Revenue: I inclose herewith remittance covering tax, penalties, and interest itemized below: Tax ..... $ ..... Penalty 25% ..... *Penalty 5% ..... *Interest assessed ..... Total ..... $ ..... *Applicable to sales tax only. ..... (Signature of taxpayer)	Collector's "Paid" stamp

Return this form with remittance

Name and address	Items	Paid	Assessment	Description
Frank Rizzo, Port Johnson, New Jersey. Tax on 276,113.40 p. gal. alcohol at $2.00 per gal. under [549] sec. 2 L. T. A. of 1934 (included in which is the tax at the rate of $1.10 per p. gal. Imposed by sec. 900, R. A. 1926) [550] and all other claimants to the 276,113.40 proof gallons of alcohol or the proceeds of the sale thereof in the registry of the United States Circuit Court of Appeals for the Third Circuit, at Philadelphia, Pa.	$552,226.80	.....	$552,226.80	Period 12-12-32. 12-8-34. 4-9

551 Form 668–A. Treasury Department. Internal Revenue Service. Revised Nov. 1933.

Notice of levy

UNITED STATES OF AMERICA,
1st Penna. Collection District, State of Penna.

TO CLERK FOR THE THIRD UNITED STATES CIRCUIT COURT OF APPEALS, AT PHILADELPHIA, PENNA.

You are hereby notified that there is now due, owing, and unpaid from Frank Rizzo, et al., Port Johnson, New Jersey, to the United States of America the sum of five hundred & fifty-two thousand, two hundred & twenty-six 80/100 dollars ($552,226.80) as and for an internal-revenue tax.

You are further notified that all property, rights to property, moneys, credits, and/or bank deposits now in your possession and belonging to the aforesaid Frank Rizzo, and all sums of money owing from you to the said Frank Rizzo are hereby seized and levied upon for the payment of the aforesaid tax, together with penalties and interest, and demand is hereby made upon you for the sum of

five hundred & fifty-two thousand, two hundred & twenty-six 80/100 dollars ($552,226.80) of the amount now owing from you to the said Frank Rizzo or for such lesser sum as you may be indebted to him, to be applied in payment of the said tax liability.

Dated at Phila., Pa., this 22nd day of April, 1935.

W. J. ROTHENSIES,
Collector of Internal Revenue.

(Endorsements:) Received & filed Apr. 22, 1935. William P. Rowland, clerk.

552 Form 668. Revised Oct. 1928. Treasury Department. Internal Revenue Service.

Notice of tax lien under internal-revenue laws

No.----------

UNITED STATES INTERNAL REVENUE,
1st District of Penna., Phila., Pa., April 22, 1935.

Pursuant to the provisions of section 3186 of the Revised Statutes of the United States, as amended by section 613 of the Revenue Act of 1928 (act of May 29, 1928, 45 Stat. 875), notice is hereby given that there have been assessed under the internal-revenue laws of the United States against the following-named taxpayer, taxes (including penalties) which after demand for payment thereof remain unpaid, and that by virtue of the above-mentioned statute the amount of said taxes, together with interest, penalties, and costs that may accrue in addition thereto, is a lien in favor of the United States upon all property and rights to property belonging to said taxpayer, to wit:

Name of taxpayer, Frank Rizzo et al.

Residence or place of business, Port Johnson, New Jersey.

Nature of tax, April 1935 distilled spirits list-P-O-)-2nd supplemental tax on 276,113.40 p. gal. alcohol @ $2.00 per p. gal. under sec. 2 L. T. A. of 1934 (included in which is the tax at the rate of $1.10 per p. gal. imposed by sec. 900 R. A. 1926) and all other claimants to the 276,133.40 proof gallons of alcohol or the proceeds of sale thereof in the registry of the United States Circuit Court of Appeals for the Third Circuit at Philadelphia, Pa.

Amount of tax assessed, $552,226.80.

Date assessment list received, 4-20-35.

W. J. ROTHENSIES,
Collector.

CERTIFICATE OF OFFICER AUTHORIZED BY LAW TO TAKE ACKNOWLEDGMENTS

STATE OF PENNSYLVANIA,
County of Philadelphia, ss:

On this day personally appeared before me a deputy clerk, District Court United States, Eastern District of Pennsylvania, in and for the State and county aforesaid, W. J. Rothensies, collector of internal revenue for the 1st district of Penna., to me well known as the person who executed the foregoing instrument, and acknowledged that he executed the same for the purposes therein expressed.

In witness whereof I have hereunto set my hand and official seal, this the 22nd day of April 1935.

[SEAL]

W. N. RITCHIE,
Deputy Clerk, District Court United States, Eastern District of Pennsylvania.

To clerk for the Third United States Circuit Court of Appeals, Phila., Pa.

(Endorsements:) Received & filed Apr. 22, 1935. William P. Rowland, clerk.

553 *Warrant for distraint*

No._____

Form 69. Treasury Department. Internal Revenue Service. Revised March 1933.

Balance forward	Date	Charge	Last credit	Unpaid balance	Account number and remarks
		Tax		$552,226.80	April 1935 distilled spirits list—P-O-O-2nd supplemental.

Rizzo, Frank, et al. Fort Johnson, New Jersey.	Date of first notice: ..... Date of second notice: .....

To----------, *Deputy Collector.*

Whereas in pursuance of the provisions of the acts of Congress relating to internal revenue the above-named person or persons is or are liable to pay the tax or taxes assessed against him, or them, in the amount or amounts named hereinbelow, together with penalties and interest prescribed by law for failure to pay said tax or taxes when the same became due; and whereas, ten days have elapsed since notice was served and demand made upon said person or persons for payment of said tax or taxes; and whereas said person or persons still neglect or refuse to pay the same: You are hereby commanded to levy upon, by distraint, and to sell so much of the goods, chattels, effects, or other property or rights to property, including stocks, securities, and evidences of debt, of the person or persons liable as aforesaid, or on which a lien exists for the tax or taxes, as may be necessary to satisfy the tax or taxes, with such additional amounts, including interest, as are shown in the statement below, and also such further sum as shall be sufficient for the fees, costs, and expenses of the levy; but if sufficient goods, chattels, or effects are not found, then you are hereby commanded to seize and sell in the manner prescribed by law so much of the real estate of said person or persons, or on which a lien exists for the tax or taxes, as may be necessary for the purposes aforesaid. You will do all things necessary to be done in the premises and strictly comply with all requirements of law, and for so doing this shall be your warrant, of which make due return to me at this office on or before the sixtieth day after the execution hereof. Tax on 276,113.40 p. gal. alcohol at $2.00 per p. gal. under sec. 2, L. T. A. of 1934 (included in which is the tax at the rate of $1.10 per p. gal. imposed by sec. 900 R. A. 1926) and all other claimants to the 276,113.40 p. gallons of alcohol or the proceeds of the sale thereof in the registry of the United States Circuit Court of Appeals for the 3rd Circuit at Phila., Pa.

Unpaid balance, $552,226.80.

Total tax, penalty, and interest due on date of second notice, $552,226.80.

Witness my hand and official seal at Phila., Pa., this 22nd day of April 1935.

W. J. ROTHENSIES,
Collector of Internal Revenue.

Internal Revenue Collection District of 1st Penna.

554 ORIGINAL

Form 17 (Rev. Aug. 1925). Treasury Department. Internal Revenue Service.

Notice and demand for tax

SECOND SUPPLEMENTAL, APRIL 1935, DISTILLED SPIRITS P. O. O.

Notice is hereby given that there has been assessed against you the amount of tax, penalty, and interest stated hereon. Demand is hereby made for immediate payment thereof. If payment is not made within ten days after date of this notice, the law provides that a penalty of 5 percent of the amount of the assessment will be added, plus additional interest on such assessment at the rate of 1 percent per month until paid.
Date 4/22/35.

To avoid further penalty and interest the amount stated on this notice must be paid to Collector of Internal Revenue at ..... within ten days from date stated above.

To the collector of internal revenue:
I enclose herewith remittance covering tax, penalties, and interest itemized below:

Tax	$.....
Penalty 25%	.....
*Penalty 5%	.....
*Interest assessed	.....
Total	$.....

*Applicable to sales tax only.

.....
(Signature of taxpayer)

Collector's "paid" stamp

Return this form with remittance

Name and address	Items	Paid	Assessment	Description
Rizzo, Frank, Port Johnson, New Jersey. Tax on 276, 113.40 p. gal. alcohol $2.00 per p. gal. under sec. 2, L. T. A. of 1934 (included in which is the tax at the rate of $1.10 per p. gal. imposed by sec. 900 R. A. 1926) and all other claimants to the 276 113.40 proof gallons of alcohol or the proceeds of the sale thereof in the registry of the United States Circuit Court of Appeals for the Third Circuit, at Philadelphia, Pa.	552, 226. 80	.....	552, 226. 80	Period 12-12-32. 12-8-34.

555 In United States Circuit Court of Appeals

Assignment by Rizzo to Fisher

(Filed April 25, 1935)

Know all men by these presents, that I, Frank Rizzo, of the City of Bayonne, County of Hudson, and State of New Jersey, for and in consideration of the sum of Twenty Thousand (20,000.00) Dollars, to me in hand paid, with the accumulated interest thereon and expenses incidental thereto, in total now amounting to Thirty-one Thousand (31,000.00) Dollars as of the date hereof, do hereby assign, set over, and transfer unto Charles Fisher, residing at the Century Hotel, in the City of New York and State of New York, the sum of Thirty-one Thousand (31,000.00) Dollars out of the moneys due me or to grow due me unassigned and on deposit with the Clerk of the United States Circuit Court of Appeals for the Third Circuit at Philadelphia, with authority to the said Charles Fisher to receive the same and receipt therefore, and with further authority to do as I could or might do were these Presents not made, at his own cost and expense.

Now, I hereby further authorize, appoint, and designate the said Charles Fisher with full power and authority to take all necessary steps to enforce the payment of the said sum due him under and by virtue of this assignment the same as I could or might do were these Presents not made, but at his own cost and expense.

I further covenant and agree that there is due to me at least the sum of Thirty-one Thousand ($31,000.00) Dollars, unpledged and unassigned in the cause wherein Frank Rizzo is claimant, and the United States of America is libellant, and hereby authorize and direct the Clerk of the said Court to pay said sum of money to the said Charles Fisher upon presentation of said assignment.

In witness whereof, I have hereunto set my hand and seal this 8th day of April 1935.

FRANK RIZZO [L. S.]

Signed, sealed, and delivered in the presence of—
William N. Margolis.

556 STATE OF NEW JERSEY,
County of Essex, ss:

On this 8th day of April 1935, before me, An Attorney at Law of the State of New Jersey, personally appeared, Frank Rizzo, to me personally known and known to me to be the person described in and who executed the foregoing instrument and acknowledged that he executed the same.

WILLIAM N. MARGOLIS,
An Attorney at Law of New Jersey.

[File endorsement omitted.]

557 In United States Circuit Court of Appeals for the Third Circuit

No. 5247. October term, 1933

FRANK RIZZO, CLAIMANT, ETC., APPELLANT
vs.
UNITED STATES OF AMERICA, APPELLEE

Order Directing Payment of Fund to Claimant, Rizzo

Filed June 4, 1935

This cause came on to be heard on petition filed in this Court for a lien for taxes on the fund realized from the sale of the alcohol and on motion of the claimant for an order directing the Clerk to pay over to him the said fund deposited in the Registry of this Court, in accordance with the final decree of this Court entered on October 2, 1934; and it appearing that petitioner had full opportunity when it filed its libel to raise therein the question of the said lien here sought to be enforced but did not do so, but waited

until the libel suit had gone to final decree and until after the Supreme Court had denied the application for writ of certiorari and then attempted for the first time to raise the question of taxes,

On consideration whereof it is now here, after full argument by counsel and briefs submitted, ordered, adjudged, and decreed that the said fund be paid over by the Clerk of this Court to the Claimant, Rizzo, or his assigns, in accordance with the decree heretofore entered on October 2, 1934.

Philadelphia, June 4, 1935.

PER CURIAM,
BUFFINGTON,
Circuit Judge.

[File endorsement omitted.]

558 In United States Circuit Court of Appeals for the Third Circuit

[Title omitted.]

Petition for stay pending application for certiorari

Filed June 6, 1935

To the Honorable Judges of the United States Circuit Court of Appeals for the Third Circuit:

The petition of the United States of America by Harlan Besson, Esq., United States Attorney in and for the District of New Jersey, respectfully shows that:

1. On June 4, 1935, a decree was entered in the above-named cause, ordering, adjudging, and decreeing that the fund now in the registry of the Court, which constitutes the proceeds of the sale of certain seized alcohol, which formed the subject matter of this suit, should be paid over to the claimant, Frank Rizzo, or his assigns, in accordance with the decree heretofore entered in this cause on October 2, 1934.

2. Your petitioner desires to make application to the United States Supreme Court for a writ of certiorari to review the decree entered in this cause on June 4, 1935, which is heretofore described in this petition. That to perfect such application for writ of certiorari will require the printing of certain records and documents in this cause for presentation to the United States Supreme Court in conformity with its rules.

3. That the Attorney General of the United States, by his lawfully authorized assistants, is proceeding as speedily as possible to perfect the petition for certiorari in appropriate form for presentation to the Supreme Court.

Wherefore, your petitioner prays that all proceedings by this Court in conformity with the decree entered herein on June 4,

1935, and the decree entered on October 2, 1934, be stayed
559 pending the determination of said application to the Supreme Court for a writ of certiorari and for such other and further relief upon petitioner's application for proceedings on the mandate of this Court that may be just, and your petitioner further prays that the Clerk of the United States Circuit Court of Appeals for the Third Circuit be directed to continue to keep in his custody and control in the registry of the court, until the further order of this court, the fund directed to be paid over to the claimany, Frank Rizzo, or his assigns, by the final decree entered in this court in the above-named cause on October 2, 1934, and by the decree entered in this court in said cause on June 4, 1935.

Respectfully,

UNITED STATES OF AMERICA,
By HARLAN BESSON,
United States Attorney for the District of New Jersey.

[File endorsement omitted.]

560 *In United States Circuit Court of Appeals for the Third Circuit*

[Title omitted.]

Order staying proceedings

And afterwards, to wit, on the 6th day of June 1935, come the parties aforesaid by their counsel aforesaid, and this case being called for hearing on the petition of the Government for stay of proceedings and stay of distribution of the fund in this Court, pending a petition by the Attorney General to the Supreme Court of the United States for a writ of certiorari, before the Honorable Joseph Buffington and Honorable J. Warren Davis, Circuit Judges;

Whereupon the Court ordered all further proceedings in this Court be stayed pending the outcome of the said petition for writ of certiorari.

561 Form 668, Revised Oct. 1928. Treasury Department. Internal Revenue Service.

Notice of tax lien under internal-revenue laws

No. ----------

UNITED STATES INTERNAL REVENUE,
1st District of Pennsylvania, June 7, 1935.

Pursuant to the provisions of Section 3186 of the Revised Statutes of the United States, as amended by Section 613 of the Revenue Act of 1928 (Act of May 29, 1928, 45 Stat., 875), notice is hereby given that there have been assessed under the Internal Revenue laws of the United States against the following-named tax payer, taxes (includ-

ing penalties) which after demand for payment thereof remain unpaid, and that by virtue of the above-mentioned statute the amount of said taxes, together with interest, penalties, and costs that may accrue in addition thereto, is a lien in favor of the United States upon all property and rights to property belonging to said taxpayer, to wit:

Name of taxpayer, Frank Rizzo.
Residence or place of business, 43 E. 36th Street, Bayonne, N. J.
Nature of tax, income.
Taxable period, Additional 1932.

Amount of tax assessed	$124,164.32
Additional (penalty) tax assessed (Penalty, $93,123.24; Int., $15,144.64)	108,267.88
Total	232,432.20

Date assessment list received, March 27, 1935.

W. J. ROTHENSIES, *Collector.*

CERTIFICATE OF OFFICER AUTHORIZED BY LAW TO TAKE ACKNOWLEDGMENTS

STATE OF PENNSYLVANIA,
County of Philadelphia, ss:

On this day personally appeared before me a Deputy Clerk, District Court, United States Eastern District of Pennsylvania, in and for the State and County aforesaid, W. J. Rothensies, Collector of Internal Revenue for the First district of Pennsylvania, to me well known as the person who executed the foregoing instrument, and acknowledged that he executed the same for the purposes therein expressed.

In witness whereof I have hereunto set my hand and official seal, this the Seventh day of June 1935.

[SEAL] EDGAR GARRETT,
Deputy Clerk, District Court,
United States Eastern District of Pennsylvania.

To WM. P. ROWLAND,
Clerk U. S. Circuit Court of Appeals, Philadelphia, Pa.

(Endorsements:) Received & Filed June 7, 1935. Wm. P. Rowland, Clerk.

562 Form 668–A. Treasury Department. Internal Revenue Service. Revised Nov. 1933.

Notice of levy

UNITED STATES OF AMERICA,
First Collection District, State of Pennsylvania.

To CLERK U. S. CIRCUIT COURT OF APPEALS AT PHILADELPHIA, PA.:

You are hereby notified that there is now due, owing, and unpaid from Frank Rizzo, 43 E. 36th Street, Bayonne, N. J., to the United

States of America the sum of two hundred thirty-two thousand four hundred thirty-two 20/100 dollars ($232,432.20) as and for an internal-revenue tax.

You are further notified that all property, rights to property, moneys, credits, and/or bank deposits now in your possession and belonging to the aforesaid Frank Rizzo and all sums of money owing from you to the said Frank Rizzo are hereby seized and levied upon for the payment of the aforesaid tax, together with penalties and interest, and demand is hereby made upon you for the sum of 232,432.20 dollars ($232,432.20) of the amount now owing from you to the said Frank Rizzo or for such lesser sum as you may be indebted to him, to be applied in payment of the said tax liability.

Dated at Philadelphia, Pa., this seventh day of June 1935.

W. J. ROTHENSIES,
Collector of Internal Revenue.

563 Form 69. Treasury Department. Internal Revenue Service. Revised March 1933.

Warrant for distraint

No. _____

Balance forward	Date	Charge	Last credit	Unpaid balance	Account number and remarks
1st to.....	Tax penalty, 2-27-35.	$124,164.32 93,123.24 15,144.64	.....	$232,432.20	June 590000. 35L.
Frank Risso, 43 E. 36th St., Bayonne, N. J.		Date of first notice: 3-28-35. Date of second notice: 3-28-35.			

To _____, *Deputy Collector.*

Whereas in pursuance of the provisions of the Acts of Congress relating to internal revenue the above-named person or persons is or are liable to pay the tax or taxes assessed against him, or them, in the amount or amounts named hereinbelow, together with penalties and interest prescribed by law for failure to pay said tax or taxes when the same became due; and whereas, ten days have elapsed since notice was served and demand made upon said person or persons for payment of said tax or taxes; and whereas said person or persons still neglect or refuse to pay the same: You are hereby commanded to levy upon, by distraint, and to sell so much of the goods, chattels, effects, or other property or rights to property, including stocks, securities, and evidences of debt, of the person or persons liable as aforesaid, or on which a lien exists for the tax or taxes, as may be necessary to satisfy the tax or taxes, with such additional amounts, including interest, as are shown in the statement below, and also such further sum as shall be sufficient for the fees, costs, and

expenses of the levy; but if sufficient goods, chattels, or effects are not found, then you are hereby commanded to seize and sell in the manner prescribed by law so much of the real estate of said person or persons, or on which a lien exists for the tax or taxes, as may be necessary for the purposes aforesaid. You will do all things necessary to be done in the premises and strictly comply with all requirements of law, and for so doing this shall be your warrant, of which make due return to me at this office on or before the sixtieth day after the execution hereof. Unpaid balance addtl. 1932 income tax TR FR 5th N. J. $232,432.20.

Witness my hand and official seal at Philadelphia this seventh day of June 1935.

W. J. ROTHENSIES,
Collector of Internal Revenue.
Internal Revenue Collection District of First Penna.

564 [Clerk's certificate to foregoing transcript omitted in printing.]

565 Supreme Court of the United States

Order allowing certiorari

Filed October 14, 1935

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[Endorsement on cover:] File no. 39826. U. S. Circuit Court of Appeals. Third Circuit. Term no. 272. The United States of America, Petitioner, vs. Frank Rizzo, Claimant of 146,157 Gallons of Alcohol. Petition for a writ of certiorari and exhibit thereto. Filed July 23, 1935. Term no. 272 O. T. 1935.

U. S. GOVERNMENT PRINTING OFFICE: 1935

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In the Supreme Court of the United States

OCTOBER TERM, 1935

No. ——

UNITED STATES OF AMERICA, PETITIONER

v.

FRANK RIZZO, CLAIMANT OF 146,157 GALLONS OF Alcohol

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

The Solicitor General, on behalf of the United States of America, prays that a writ of certiorari issue to review the order of the Circuit Court of Appeals for the Third Circuit entered in the above cause on June 4, 1935.

OPINION BELOW

No opinion was rendered by the Circuit Court of Appeals, the reasons for its order being stated therein (R. 546).

JURISDICTION

The order of the Circuit Court of Appeals was entered June 4, 1935. (R. 546.) The juris-

diction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

STATUTES AND RULES INVOLVED

The statutes and rules involved will be found in the Appendix, *infra*, pp. 19–22.

QUESTIONS PRESENTED

Pending final determination of the claimant's appeal in a forfeiture proceeding in admiralty against a cargo of alcohol, the claimant petitioned the Circuit Court of Appeals to order a sale of the same, because of the necessity of removing the alcohol from the vessel in which it was contained. The court ordered the sale, which was made free of internal revenue taxes, and confirmed the sale on those terms. The proceeds of the sale were deposited in the registry of the court.

The questions presented are:

1. Has the Government lost its right to assert against the proceeds of sale a claim for internal revenue taxes due on the alcohol before the sale, by not asserting such claim in its libel for forfeiture?

2. Has the Government lost its right to assert against the proceeds of sale a claim for internal revenue taxes due on the alcohol, by awaiting the outcome of the forfeiture proceeding before asserting the claim for tax?

3. Did the Government lien, which attached to the alcohol before sale, thereafter attach to the proceeds of sale?

STATEMENT

On December 12, 1932, the oil barge DORIS and her cargo of 146,157 gallons of grain alcohol were seized by Customs and Coast Guard officials acting jointly as she was lying in dock at Port Johnson, Bayonne, New Jersey. (R. 4–24.) On December 22, 1932, and December 30, 1932, respectively, a libel and an amendment thereto were filed in the United States District Court for the District of New Jersey against the vessel and its cargo of alcohol. The ground for forfeiture set up in the libel was violation of Section 584, paragraph 814, Section 594 of the Tariff Act of 1930, and Section 4377 of the Revised Statutes. (R. 4, 22.) The District Court declared the alcohol forfeited for violation of Section 4377 of the Revised Statutes and ordered it sold by the United States Marshal, and that the proceeds be deposited in the registry of the court. (R. 46–47.) The claimant appealed from the order of the District Court, and on October 2, 1934, the Circuit Court of Appeals for the Third Circuit reversed the decree of forfeiture and ordered the alcohol, or its proceeds in the event it had been sold, returned to the claimant. (R. 513.) The final decree was entered the same day. (R. 514.) At that time the alcohol had not been sold, but was in the custody of the United States Marshal for the District of New Jersey. (R. 526.) The Government filed a petition for rehearing, which was denied December 5, 1934. (R. 525.)

On November 19, 1934, while the petition for rehearing was pending, the claimant filed a petition asking the court to order a sale of the alcohol on the ground that the barge DORIS, in which the alcohol was then contained, had been sold and immediate delivery of the barge was imperative. The petition further asked that the proceeds of sale be paid into the registry of the court. (R. 515–517.) On November 22, 1934, the Circuit Court of Appeals ordered the alcohol sold, and further ordered that the proceeds of sale should be deposited in the registry of that court, and "be substituted in the place and stead of said 146,157 gallons of alcohol", and that all further procedings should be against said proceeds of sale. (R. 521–523.) On December 4, 1934, that court by its order fixed the terms of sale which included terms that the sale was pursuant to its order of November 22, 1934, and that the cargo of alcohol was offered for sale free and clear of all claims of any kind or character, but subject to the court's approval and confirmation. (R. 523–525.) On December 8, 1934, the United States Marshal for the District of New Jersey offered the said alcohol at public auction, and the highest bid therefor was $1.85 per wine gallon. (R. 526.) On December 11, 1934, the court below entered its order confirming the sale, and directed the United States Marshal to deliver the alcohol to the purchaser free of all government taxes or tax liens and custom duties. (R. 527–528.) The Government duly excepted to the making and

entry of the order. (R. 528.) A petition for a writ of certiorari, wherein was questioned the authority of the Circuit Court of Appeals to include such provisions in its order of confirmation, was denied by this Court on January 21, 1935. *United States* v. *Frank Rizzo, Claimant of 146,157 Gallons of Alcohol,* October Term, 1934, No. 621. Afterward, the United States Marshal consummated the sale, and deposited in the registry of the Circuit Court of Appeals approximately $265,000.

On January 24, 1935, there were filed in the clerk's office of the Circuit Court of Appeals certain alleged assignments of about $221,000 of said proceeds from the claimant Rizzo to his attorneys and another person. (R. 529–531.) On February 2, 1935, the United States filed a petition with said Circuit Court of Appeals, setting forth that internal revenue taxes in the sum of $552,226.80 were due on the alcohol, and asking said court to direct that the proceeds of sale then in its registry, or to come into its registry, be appropriated toward the payment of the tax due on said alcohol. Attached to and supporting this petition was the affidavit of the Collector of Internal Revenue for the Fifth Collection District of New Jersey, certifying that prior to the seizure of said alcohol and continuing thereafter, no tax on the same had been paid. (R. 532–536.) On April 22, 1935, a notice of levy for the full amount of the tax was addressed to and filed with the clerk of said Circuit Court of Appeals by the Collector of Internal Revenue for the First

Collection District of New Jersey, together with warrant for distraint, two notices of tax liens under internal revenue laws, and a copy of notice and demand for tax. (R. 537–541.) On the same date, similar notices and demands were addressed to and filed with the clerk of said Circuit Court of Appeals by the Collector of Internal Revenue for the First Collection District of Pennsylvania. (R. 542–545.) On April 25, 1935, there was filed with the clerk of said court another assignment by the claimant to one Charles Fisher of the sum of $31,000 of the proceeds then on deposit in the court's registry. (R. 545–546.)

On June 4, 1935, the court below entered the order now complained of, declaring in effect that since the Government had failed to raise the question of taxes when it filed its libel, but waited until the libel suit had gone to final decree and until after this Court had denied the application for writ of certiorari, it was then too late to do so; and the court ordered that the proceeds of sale be paid over by the clerk to the claimant or his assigns. (R. 546–547.)

On June 6, 1935, a petition by the United States, addressed to the Circuit Court of Appeals for the Third Circuit, was filed, setting forth its intention to apply to this Court for a writ of certiorari; whereupon said court ordered all further proceedings stayed pending the outcome of the petition for a writ of certiorari. (R. 547–548.)

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding in effect that the United States had waived its right to assert a claim for taxes on the alcohol by not asserting it in the original libel for forfeiture.

2. In holding in effect that the United States was chargeable with laches in not raising the question of taxes in the forfeiture proceedings.

3. In failing to order the payment of taxes due on the alcohol out of the proceeds of sale when it had been formally notified of the existence of the tax claim.

4. In ordering that the entire proceeds of sale of the alcohol be paid over to the claimant or his assigns in disregard of the Government's claim for taxes.

5. In denying the Government's petition for payment of the tax out of the proceeds of sale in the registry of the court.

REASONS FOR GRANTING THE WRIT

1. The decision below, holding in effect that the Government waived, or by laches lost, its right to assert a claim for taxes due on the alcohol, by failing to assert it in the original libel or earlier in the proceedings, is untenable, and in conflict with the weight of authority.

(a) By seeking forfeiture of the alcohol, the Government did not thereby waive its right thereafter to seek collection of any taxes that might be

due thereon. The libel for forfeiture was based upon alleged violations of the customs and navigation laws. The right to forfeiture for violations of customs and navigation laws exists wholly independent of the Government's right to tax the subject-matter. The result of the forfeiture proceedings could only be the determination of the right of ownership of the alcohol as between the Government and the claimant. The District Court had decreed forfeiture. But if in the forfeiture proceedings it should be finally determined that claimant was the owner of the alcohol, then the liability of claimant for payment of tax on the alcohol would thereupon arise. With the alcohol in his possession, the claimant himself would have been compelled to pay the taxes imposed by Section 900 of the Revenue Act of 1926, as amended by Section 2 of the Liquor Taxing Act of January 11, 1934, *infra*, p. 19, 20.

No estoppel or waiver by election exists. The remedy by forfeiture and the right to tax are separate and distinct. They do not depend upon the same facts. Because of the alleged violation of the customs and navigation laws, the right to seek forfeiture of the alcohol arose; in addition, and because of the revenue laws, the alcohol became subject to a tax. It cannot be said, as was urged below, that the United States, by proceeding against the alcohol for forfeiture, had elected to pursue one of two inconsistent rights or remedies, thereby waiving its right to the tax.

This Court has previously considered the question of waiver or estoppel by election. In *Bierce* v. *Hutchins,* 205 U. S. 340, at page 346, this clear statement of principles is found, "Election is simply what its name imports; a choice, shown by an overt act, between two inconsistent rights, either of which may be asserted at the will of the chooser alone." See also *Zimmerman* v. *Harding,* 227 U. S. 489; *Southern Pacific Company* v. *Bogert,* 250 U. S. 483.

The decisions of this Court in *General Motors Acceptance Corporation* v. *United States,* 286 U. S. 49, *United States* v. *The Ruth Mildred,* 286 U. S. 67, *United States* v. *Commercial Credit Corporation,* 286 U. S. 63, and *General Import & Export Company* v. *United States,* 286 U. S. 70, are not applicable to the present situation. In those cases, this Court considered and settled only the question of election of forfeiture remedies as between (a) the customs and navigation laws, and (b) the National Prohibition Act, Title 26.

This case does not present a situation in which the Government had elected to rely on one of two inconsistent causes of forfeiture, and is now attempting to invoke the other. We are no longer concerned with the forfeiture proceeding as such. Even if it could be said that the Government had made an election of remedies in that proceeding, that fact would have no significance at this time in connection with the present assertion of a claim for taxes, a wholly separate and distinct claim.

(b) The Government was not guilty of laches in failing to raise the question of taxes earlier.

The District Court held herein that the claimant Rizzo was not the owner of the alcohol and ordered that it should be forfeited, and further (R. 53)—

> ORDERED, ADJUDGED and DECREED, that the proceeds of sale of said 146,157 gallons of alcohol, be deposited in the registry of this court to be forfeited to the United States of America, in the event that the decree heretofore entered herein, and as amended, becomes final by lapse of time within which appeal may be taken, or be affirmed upon appeal in the event an appeal is taken, and that in the event the decree herein as amended shall be reversed on appeal and final judgment entered for the claimant of said 146,157 gallons of alcohol, then the said proceeds of sale so deposited as aforesaid, in the registry of this court, shall become the property of and be delivered to the said claimant; and it is further
>
> ORDERED, ADJUDGED and DECREED, that said proceeds of sale so deposited in the registry of this court, shall be substituted in the place and stead of said 146,157 gallons of alcohol, and that all further proceedings herein shall be against said proceeds of sale.

Under those circumstances there was then no occasion or necessity for the assertion by the Government of its tax claim. The Circuit Court of Appeals reversed the District Court's decree of

forfeiture. The alcohol not having been sold, claimant Rizzo petitioned the Circuit Court of Appeals, seeking the sale of the alcohol as perishable, and asked that the sale be made in accordance with the District Court's order of sale. The Circuit Court of Appeals decreed the sale and ordered that the proceeds be deposited in the registry of that court, and—

> Further, ORDERED, ADJUDGED and DECREED, that said proceeds of sale so deposited in the registry of this court, shall be substituted in the place and stead of said 146,157 gallons of alcohol, and that all further proceedings herein shall be against said proceeds of sale.

It is clear that up to this point all parties, as well as the District Court and the Circuit Court of Appeals, were proceeding on the theory that any interest in or claims against the alcohol would be realized from the proceeds of sale thereof. Accordingly, the Government was wholly justified in interpreting and relying upon the court's orders as protection of the Government's claim for taxes.

The agreement to the terms of sale, referred to in the court's order of December 4, 1934, did not indicate or imply any relinquishment by the Government or the claimant of their respective rights, or claims to the proceeds of sale.

When the court on December 11, 1934, confirmed the sale and issued directions to the United States Marshal to deliver the alcohol to the purchaser free

of government taxes and tax liens, it did not thereby decide that there were no taxes due on the alcohol. The only effect of the order of confirmation of the sale was that the court determined that the price bid was the best price obtainable for the same; and when the court directed that the alcohol be delivered to the purchaser free and clear of all government taxes and tax liens, it clearly indicated the fact that no taxes had been paid, and by directing the proceeds of sale to be deposited in its registry created a fund out of which the taxes, so far as possible, should be paid.

The sale was completed and the proceeds were paid into the registry of the court on January 21, 1935. The Government filed its petition in the Circuit Court of Appeals on February 2, 1935, asserting its tax lien. The petition was in full conformity with and provided for by Rule 42 of the Admiralty Rules, *infra,* p. 22. Clearly the proper procedure was followed.

2. By ordering the delivery of the alcohol to the purchaser free of government taxes, the court below recognized that the taxes had not been paid, and by requiring the proceeds to be deposited in its registry the court must be presumed to have intended to protect the Government in the collection of its taxes. Any other construction or effect that may be given to its orders or conduct in the premises would indicate an intent to dispose of the alcohol in direct violation of the internal-revenue laws.

By the Revenue Act of February 26, 1926, c. 27, Sec. 900, 44 Stat. 9, as amended by the Act of January 11, 1934, c. 1, Sec. 2, 48 Stat. 313, a basic tax is imposed on all distilled spirits produced in or imported into the United States. By Section 3248 of the Revised Statutes (U. S. C., Title 26, Sec. 242), the tax attaches as soon as the spirits come into existence as such.

Under the circumstances herein, and after Rizzo was held to be a lawful owner of the alcohol, the orderly procedure for the collection of the tax due on the alcohol would, under Sections 246 and 262 of Title 26, U. S. C. (R. S. 3334, Act of March 1, 1879, c. 125, 20 Stat. 340, and Sec. 48 of the Act of August 27, 1894, c. 349, 28 Stat. 563), have been to require the payment of the tax and the affixing of tax-paid stamps to the containers of the alcohol, when it was sold by order of the court. This, however, was not done. It therefore became necessary for the Government to assert its lien against the proceeds of sale.

That the United States has a lien on distilled spirits for the amount of the taxes due thereon, until paid, has been held by this Court. *Thompson* v. *United States,* 142 U. S. 471; *United States* v. *One Ford Coupe,* 272 U. S. 321; *United States* v. *Ulrici,* 111 U. S. 38.

By Section 3251 of the Revised Statutes (U. S. C., Title 26, Sec. 249) the tax is declared to be a first lien on the spirits until the tax is paid.

Upon the sale of the alcohol and the deposit of the proceeds of sale in the registry of the court, the lien for taxes was transferred to said proceeds of sale. *The Lottawanna,* 20 Wall. 201; *The Siren,* 7 Wall. 152.

In *Union Trust Co.* v. *Great Eastern Lumber Co.,* 248 Fed. 46, 50 (C. C. A. 5th), it was held to be—

> the recognized duty of the court, which had displaced the usual remedies for the collection of taxes by the receivership, to provide for the payment of taxes out of the proceeds of the sale, and not to remit the tax authorities to a belated use of their remedies against the property after it had passed out of the court's possession into that of the purchaser * * *.

In *Heyman* v. *United States,* 285 Fed. 685 (C. C. A. 6th), the bankrupt's trustees had sold distilled spirits without requiring the floor tax to be paid by the purchasers at the time of sale, although retaining the equivalent of this additional tax as a fund in bankruptcy. The court held (p. 688):

> In good conscience the court could not make the purchasers pay the tax again, nor can it permit the trustees to retain the fund accumulated under an erroneous order of sale contrary to the rights of the government, which was then no party to the proceedings. Further, in conscience, the government is entitled to this fund. It does, in effect, represent the tax. It is, as held by the court below, a trust fund.

In *Averill* v. *Smith,* 17 Wall. 82, 95, the Court said:

> Perishable property may be sold and the proceeds paid into the registry of the court, in which event the proceeds represent the property seized * * *.

It is uniformly held that a court of bankruptcy has power to order property sold free from liens, provided the liens are preserved against the proceeds. In *In re Franklin Brewing Co.,* 249 Fed. 333, 335 (C. C. A. 2d) the court stated:

> We have recognized the power of the court sitting in bankruptcy to sell free and clear of liens, and transfer the same to the proceeds of sale (Re Kohl-Hepp Brick Co., 176 Fed. 340, 100 C. C. A. 260; Re Haywood Wagon Co., 219 Fed. 655, 135 C. C. A. 391), agreeing with earlier considerations of the same question in the First Circuit (Re Union Trust Co., 122 Fed. 937, 59 C. C. A. 461; Re Shoe & Leather Reporter, 129 Fed. 588, 64 C. C. A. 156).

Pursuant to Section 3182, Revised Statutes (U. S. C., Title 26, Sec. 102), the Commissioner of Internal Revenue made an assessment against Rizzo and all other claimants to the alcohol, "or the proceeds of the sale thereof" in the registry of the court. By this assessment there was determined the amount of tax due, and that it had not been paid. The assessment is *prima facie* evidence that the tax is due. *United States* v. *Rindskopf,* 105 U. S. 418.

Pursuant to Section 3186, Revised Statutes, as amended by Section 613 of the Revenue Act of 1928 (c. 852, 45 Stat. 791, 875), the Collector of Internal Revenue for the First District of Pennsylvania filed with the clerk of the U. S. Circuit Court of Appeals for the Third Circuit a notice of tax lien under the internal-revenue laws.

In the assertion of its lien, and pursuant to Rule 42 of the Admiralty Rules, the Government filed its petition in the Circuit Court of Appeals.

The United States has duly and promptly complied with the statutory provisions for the assertion of its tax lien.

Under these circumstances, it was the clear duty of the Circuit Court of Appeals to order that the proceeds of sale held in its registry should be paid to the United States in satisfaction *pro tanto* of the tax due on the alcohol.

The ruling of the court below denying the Government's lien on the proceeds of sale in effect constitutes an erroneous interpretation and application of a Federal statute giving to the Government a first lien on distilled spirits for the payment of Federal taxes due thereon, until paid. The legal effect of the statute, as applied to a situation such as herein presented, we believe, has not been, but should be, passed upon by this Court.

3. The question herein presented is before this Court for the first time in these proceedings. The prior petition did not in any way raise the question now presented, as to the right of the Government

to assert against the proceeds its lien for taxes. The prior petition for writ of certiorari presented the question whether the lower court had authority to order the sale of the alcohol free and clear of all revenue taxes, when such taxes had not been paid, and, in confirming the sale, to order that the alcohol be treated by the Government as tax paid. The denial of that petition is not to be applied or interpreted as deciding that no taxes were due, or that the Government might not thereafter enforce its tax lien against the proceeds of sale, as it now seeks to do. The only fair and reasonable inference to be drawn from the order of the Circuit Court of Appeals confirming the sale free and clear of claims for taxes, and this Court's denial of the petition for certiorari, would seem to be that it was intended thereby to substitute the proceeds of sale in place of the alcohol itself and that any claims or interest in the alcohol should thereafter attach to the proceeds, thus preserving the rights of all parties.

By the prior petition for certiorari the Government sought to maintain its rights against the *res* which was then in the custody of the court. By the present petition the Government is seeking to maintain its rights against the proceeds of sale of the *res*. By denial of the prior petition it was finally determined in effect that the Government could not prevent the confirmation of sale of the alcohol on the terms indicated. But, we submit, it does not follow that the Government thereby lost

its lien and right against the proceeds of the sale. That right has been duly and promptly asserted. But the Circuit Court of Appeals has held that the right has been lost because the Government did not include its tax claim in the original libel and forfeiture proceeding. We submit that holding cannot stand.

CONCLUSION

The decision of the court below in effect deprives the United States of its right to assert its claim for taxes. The Government has not in any way waived or for any reason lost its lien for the payment of taxes. Upon the sale of the alcohol the lien attached to the proceeds of sale. The Government has duly and promptly asserted its lien against the proceeds. The denial by the lower court of the Government's lien constitutes an erroneous interpretation of the Federal statute, and further constitutes a clear departure from the accepted and usual course of judicial procedure, and thus calls for the exercise of this Court's power of supervision.

Wherefore, it is respectfully submitted that this petition should be granted.

STANLEY REED,
Solicitor General.

JULY 1935

APPENDIX

The Revenue Act of February 26, 1926, c. 27, Section 900, 44 Stat. 9, 104 (Title 26, U. S. C., Sec. 245) provides:

Subdivision (a) of section 600 of the Revenue Act of 1918, as amended, is amended to read as follows:

"SEC. 600. There shall be levied and collected on all distilled spirits now in bond or that have been or that may be hereafter produced in or imported into the United States, in lieu of the internal-revenue taxes now imposed thereon by law, an internal-revenue tax at the following rates, to be paid by the distiller or importer when withdrawn, and collected under the provisions of existing law:

* * * * *

"(3) On and after January 1, 1928, $1.10 on each proof gallon or wine gallon when below proof and a proportionate tax at a like rate on all fractional parts of such proof or wine gallon.

"(4) On and after the enactment of the Revenue Act of 1926, on all distilled spirits which are diverted to beverage purposes or for use in the manufacture or production of any article used or intended for use as a beverage there shall be levied and collected a tax of $6.40 on each proof gallon or wine gallon when below proof, and a proportionate tax at a like rate on all fractional parts of such proof or wine gallon, to be paid by the person responsible for such diversion. If a tax at the rate of $2.20,

> $1.65, or $1.10 per proof or wine gallon has been paid upon such distilled spirits a credit of the tax so paid shall be allowed in computing the tax imposed by this paragraph.

The Act of January 11, 1934, c. 1, Section 2, 48 Stat. 313, amending the Revenue Act of 1926, provides in paragraphs 3 and 4 as follows:

> (3) On or after January 1, 1928, and until the effective date of Title I of the Liquor Taxing Act of 1934, $1.10 on each proof gallon or wine gallon when below proof and a proportionate tax at a like rate on all fractional parts of such proof or wine gallon; and
>
> (4) On and after the effective date of Title I of the Liquor Taxing Act of 1934, $2.00 on each proof gallon or wine gallon when below proof and a proportionate tax at a like rate on all fractional parts of such proof or wine gallon.

The Act of July 20, 1868, c. 186, Sec. 4, 15 Stat. 126 (Revised Statutes, Sec. 3248, U. S. C., Title 26, Sec. 242) provides:

> Distilled spirits, spirits, alcohol, and alcoholic spirit, within the true intent and meaning of this chapter, is that substance known as ethyl alcohol, hydrated oxide of ethyl, or spirit of wine, which is commonly produced by the fermentation of grain, starch, molasses, or sugar, including all dilutions and mixtures of this substance; and the tax shall attach to this substance as soon as it is in existence as such, whether it be subsequently separated as pure or impure spirit, or be immediately, or at any subsequent time, transferred into any other substance, either in the process of original production or by any subsequent process.

The Act of June 6, 1872, c. 315, Sec. 12, 17 Stat. 238 (Revised Statutes, Sec. 3251, U. S. C., Title 26, Sec. 249) provides:

> Every proprietor or possessor of, and every person in any manner interested in the use of, any still, distillery, or distilling apparatus, shall be jointly and severally liable for the taxes imposed by law on the distilled spirits produced therefrom, and the tax shall be a first lien on the spirits distilled, the distillery used for distilling the same, the stills, vessels, fixtures, and tools therein, the lot or tract of land whereon the said distillery is situated, and on any building thereon from the time said spirits are in existence as such until the said tax is paid.

Admiralty Rule No. 11 provides:

> In all cases where any goods or other things are arrested, if the expense of keeping the same is excessive or disproportionate, or if the same are perishable, or are liable to deterioration, decay, or injury, by being detained in custody pending the suit, the court may, on the application of either party, order the same or any portion thereof to be sold; and the proceeds, or so much thereof as shall be full security to satisfy any decree, to be brought into court to abide the event of the suit; or the court may, on the application of the claimant, order a delivery thereof to him, either on the filing of a written agreement of the parties or their proctors of record to that effect, or on a due appraisement, to be had under its direction, unless the value has been agreed to in writing by the parties or their proctors of record, on the claimant's depositing in court so much money as the court shall order, or on his giving a stipulation, with sufficient

sureties or an approved corporate surety, in such sum as the court shall direct or as shall be agreed upon in writing by the parties or their proctors of record, conditioned to abide by and pay the money awarded by the final decree rendered by the court, or any appellate court, if any appeal intervenes, not to exceed however in any event such agreed or appraised value with interest at six per cent. per annum and costs, as the one or the other course shall be ordered by the court.

Admiralty Rule No. 42 provides:

> Any person having an interest in any proceeds in the registry of the court shall have a right, by petition and summary proceedings, to intervene *pro interesse suo* for delivery thereof to him, and on due notice to the adverse parties, if any, the court shall and may proceed summarily to hear and decide thereon, and to decree therein according to law and justice. And if such petition or claim shall be deserted, or on a hearing, be dismissed, the court may, in its discretion, award costs against the petitioner in favor of the adverse party.

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No. 272

In the Supreme Court of the United States

OCTOBER TERM, 1935

UNITED STATES OF AMERICA, PETITIONER

v.

FRANK RIZZO, CLAIMANT OF 146,157 GALLONS OF ALCOHOL

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

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BRIEF FOR THE UNITED STATES

OPINION BELOW

No opinion was rendered by the Circuit Court of Appeals, the reasons for its order being stated therein. (R. 325–326.)

JURISDICTION

The order of the Circuit Court of Appeals was entered June 4, 1935. (R. 325–326.) A petition for a writ of certiorari was filed July 23, 1935 (R. 330), and was granted October 14, 1935. (R. 330.) The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the United States has by an election of remedies, laches or waiver lost the right to have its tax lien on alcohol satisfied out of the proceeds of a judicial sale of that alcohol.

2. Whether the lower court erred in not providing for the payment of taxes out of the proceeds of a judicial sale, which it had ordered upon such terms as to restrain the United States from exercising its customary methods of collecting such taxes.

STATUTES AND RULES INVOLVED

The statutes and rules involved will be found in the Appendix, *infra*, pp. 32–39.

STATEMENT

On December 12, 1932, the oil barge *Doris* and her cargo of 146,157 gallons of grain alcohol were seized as she was lying in dock at Port Johnson, Bayonne, New Jersey, by Customs and Coast Guard officials acting jointly. (R. 102, 109, 124.) On December 22, 1932, and December 30, 1932, respectively, a libel (R. 2–4) and an amendment thereto (R. 12) were filed in admiralty in the United States District Court for the District of New Jersey against the vessel's cargo of alcohol.[1]

This libel and amendment thereto prayed a forfeiture of the alcohol on four different grounds: (1) that it was not included or described in the

[1] A libel was also filed against the barge *Doris* (R. 48–50), but the proceedings with reference to that libel are not now involved in this case.

vessel's manifest and so was subject to forfeiture under the Tariff Act of 1930, Act of June 17, 1930, c. 497, Title IV, Sec. 584, 46 Stat. 590, 748 (U. S. C., Title 19, Sec. 1584); (2) that it contained more than one-half of one percentum of alcohol and had been imported into the United States without proper permit and so was subject to forfeiture under the Tariff Act of 1930, Act of June 17, 1930, c. 497, Title I, Sec. 1, Par. 814, 46 Stat. 590, 640 (U. S. C., Supp. VII, Title 19, Sec. 1001, Par. 814); (3) that, because the vessel carrying the merchandise had become subject to a penalty for violation of the customs-revenue laws, the merchandise itself was subject to forfeiture under the supposed authority of the Tariff Act of 1930, Act of June 17, 1930, c. 497, Title IV, Sec. 594, 46 Stat. 590, 751 (U. S. C., Title 19, Sec. 1594); and (4) that, because the vessel carrying the cargo was employed in a trade other than that for which she was licensed, to wit, the transportation of intoxicating liquor in violation of the National Prohibition Act, the cargo was subject to forfeiture under R. S., Sec. 4377 (U. S. C., Title 46, Sec. 325).

To this libel, one Rizzo, as claimant, filed an answer. There was in this answer only one averment which is now of any significance. That was the claimant's allegation that "the said 146,157 gallons of alcohol were not imported into the United States of America." (R. 11. See also R. 6.)

The District Court declared the alcohol forfeited on the fourth ground set out in the libel;

that is, because the cargo was carried on a vessel employed in a trade other than that for which she was licensed. R. S., Sec. 4377. (R. 29–30.) The claimant appealed from the District Court's order, and on October 2, 1934, the Circuit Court of Appeals for the Third Circuit reversed the decree of forfeiture on the theory that after the passage of the Twenty-First Amendment to the Constitution, the penalty could no longer be imposed. (R. 289–290.) The final decree was entered the same day. (R. 290–291.) The United States filed a petition for rehearing, which was denied December 5, 1934. (R. 301.)

On November 19, 1934, while the petition for rehearing was pending, the claimant filed a petition asking the court to order a sale of the alcohol on the ground that the barge *Doris,* in which the alcohol was then contained, had been sold and immediate delivery of the barge was imperative. The petition further asked that the proceeds of sale be paid into the registry of the court to be "substituted in the place and stead of the 146,157 gallons of alcohol." (R. 291–293.) On November 22, 1934, the Circuit Court of Appeals ordered the alcohol sold, and further ordered that the proceeds of sale should be deposited in the registry of that court, and "be substituted in the place and stead of said 146,157 gallons of alcohol, and that all further proceedings shall be against said proceeds of sale." (R. 297–299.)

On December 4, 1934, that court by its order fixed the terms of sale. This order provided that the cargo of alcohol should be offered for sale "free and clear of all claims of any kind or character." (R. 299–301.) On December 8, 1934, the United States Marshal for the District of New Jersey offered the said alcohol at public auction, and the highest bid therefor was $1.85 per wine gallon. (R. 301–302.) On December 11, 1934, the lower court confirmed the sale, and ordered: (1) that the United States Marshal should deliver the alcohol to the purchaser free of all government taxes or tax liens and customs duties; (2) that "the said alcohol or spirits intended for beverage purposes shall be treated by the United States Government and any of its departments as tax paid, irrespective of the lack of any stamp or tax certificate affixed thereto on the respective containers in which said alcohol may be deposited or contained. To effectuate such purpose the said Frederick C. Schneider, United States marshal, shall affix thereto under his seal an appropriate statement to said effect"; and (3) that the proceeds of sale should be paid into its registry. (R. 302–304.)

The Government duly excepted to the making and entry of this order on the ground that it was not within the jurisdiction of the Circuit Court of Appeals. (R. 304.) A petition for a writ of certiorari, wherein was questioned the authority of the Circuit Court of Appeals to include the provisions as to taxes in its order of confirmation, was

denied by this Court on January 21, 1935. *United States* v. *Frank Rizzo, Claimant of 146,157 Gallons of Alcohol,* October Term, 1934, No. 621, 294 U. S. 709.

On January 24, 1935, there were filed in the clerk's office of the Circuit Court of Appeals certain instruments purporting to assign about $221,000 of said proceeds from the claimant Rizzo to his attorneys and another person. (R. 304–306.)

On February 2, 1935, the United States filed in the Circuit Court of Appeals a petition asking that the court direct that the proceeds of the sale be paid over to the Treasury of the United States in satisfaction of the lien for taxes due on said alcohol. (R. 307–311.) In this petition it was shown (1) that the 146,157 gallons of alcohol had been found by chemical test to be 192 proof; (2) that Section 900 of the Revenue Act of 1926, c. 27, 44 Stat. 9, 104, as amended by the Liquor Taxing Act of 1934, c. 1, 48 Stat. 313 (U. S. C., Title 26, Sec. 1150), provided a tax of $2 per proof gallon; (3) that the tax on this alcohol was therefore $552,226.80; (4) that said tax was a lien on said alcohol until paid; (5) that no tax of any kind had ever been paid on said alcohol; and (6) that the lien in favor of the United States for taxes which existed on the alcohol had become a lien of $552,226.80 upon the proceeds. Attached to and supporting this petition was the affidavit of the Collector of Internal Revenue for the Fifth Collection District of New Jersey, certifying that

prior to the seizure of said alcohol and continuing thereafter, no tax on the same had been paid. (R. 310–311.)

Afterward, the United States Marshal consummated the sale, and deposited in the registry of the Circuit Court of Appeals $264,559.18. (Appendix to this brief, p. 40, *infra.*)

On April 22, 1935, a notice of levy for the full amount of the tax was addressed to and filed with the clerk of said Circuit Court of Appeals by the Collector of Internal Revenue for the First Collection District of New Jersey, together with warrant for distraint, two notices of tax liens under internal revenue laws, and a copy of notice and demand for tax. (R. 312–320.) On the same date, similar notices and demands were addressed to and filed with the clerk of said Circuit Court of Appeals by the Collector of Internal Revenue for the First Collection District of Pennsylvania. (R. 320–324.)

On April 25, 1935, there was filed with the clerk of said court another purported assignment by the claimant to one Charles Fisher of the sum of $31,000 of the proceeds then on deposit in the court's registry. (R. 324–325.)

On June 4, 1935, the court below entered the order now complained of, declaring in effect that since the Government had failed to raise the question of taxes when it filed its libel, but waited until the libel suit had gone to final decree and until after this Court had denied the application for writ of certiorari, it was then too late to do so; and the

court ordered that the proceeds of sale be paid over by the clerk to the claimant or his assigns. (R. 325–326.)

On June 6, 1935, a petition by the United States, addressed to the Circuit Court of Appeals for the Third Circuit, was filed, setting forth its intention to apply to this Court for a writ of certiorari (R. 326–327); whereupon the lower court ordered all further proceedings stayed pending the outcome of the petition for a writ of certiorari. (R. 327.)

This Court granted the Government's petition for writ of certiorari on October 14, 1935. (R. 330.)

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding in effect that the United States had waived its right to assert a claim for taxes on the alcohol by not asserting it in the original libel for forfeiture.

2. In holding in effect that the United States was chargeable with laches in not raising the question of taxes in the forfeiture proceedings.

3. In failing to order the payment of taxes due on the alcohol out of the proceeds of sale when it had been formally notified of the existence of the tax claim.

4. In ordering that the entire proceeds of sale of the alcohol be paid over to the claimant or his assigns in disregard of the Government's claim for taxes.

5. In denying the Government's petition for payment of the tax out of the proceeds of sale in the registry of the court.

SUMMARY OF ARGUMENT

The Revenue Act of February 26, 1926, c. 27, Sec. 900, 44 Stat. 9, 104, imposed upon the alcohol involved in this case an internal revenue tax of $1.10 per proof gallon. This tax was a lien upon the alcohol as soon as it was in existence. R. S., Secs. 3251, 3248. And since the tax had never been paid, the lien was still in force when the alcohol was seized. R. S., Sec. 3251. (The tax and the lien were subsequently increased to $2 per proof gallon by the Liquor Taxing Act of January 11, 1934, c. 1, Sec. 2, 48 Stat. 313; but in this case it is unnecessary to consider the increase inasmuch as the fund against which the lien is asserted is less than the original tax.)

The United States has not lost this statutory lien through election of remedies, laches or waiver. The original libel filed in the District Court was not an election to disregard the tax lien, because that original libel was founded upon alleged violations of the maritime and customs laws, and did not even collaterally involve claims for internal revenue taxes,—much less this particular tax, which was an excise on domestic production antedating the transportation which was the subject of the libel. Moreover, the United States cannot be

charged with laches, for it raised its lien claim at its earliest opportunity. This claim, being non-maritime, could not have been set forth in the libel, *Steamboat Orleans* v. *Phoebus,* 11 Pet. 175, 182, but could only be asserted by petition after a sale of the alcohol had been decreed and the proceeds therefrom had been ordered deposited in the court's registry. Admiralty Rule 42; *The Lottawanna,* 20 Wall. 201; *The J. E. Rumbell,* 148 U. S. 1, 15. Nor can it be said that the United States, by consenting to the terms on which the alcohol was sold, abandoned or waived its right to collect these taxes from the proceeds. The waiver of the United States was strictly limited to the terms of the sale, and did not include an abandonment of its rights against the proceeds. Such rights survived the sale, and, having been properly asserted, can be enforced against the proceeds of the sale. *The Lottawanna, supra; The J. E. Rumbell, supra.*

As an alternative to the *statutory* lien upon the proceeds of the sale, the United States has against these proceeds an *equitable* lien for taxes. By its order fixing the terms of sale (R. 299–301), the lower court divested the United States of two rights which it had against the alcohol on account of taxes: first, the right to require that if the alcohol were transferred by judicial sale, the purchaser should pay the taxes due, R. S., Sec. 3334, as amended (U. S. C., Title 26, Sec. 1154), and, second, the right to require that if the alcohol were

kept in unstamped containers, it should be forfeited. Act of January 11, 1934, c. 1, Title II, Sec. 206, 48 Stat. 317. Having by its judicial process restrained the United States from exercising these rights, the lower court should, upon application, have paid these taxes out of the proceeds in its registry. Cf. *In re Tyler,* 149 U. S. 164; *Union Trust Co.* v. *Great Eastern Lumber Co.,* 248 Fed. 46, 50 (C. C. A. 5th).

ARGUMENT

I

THE UNITED STATES HAS A CLAIM FOR INTERNAL REVENUE TAXES, AMOUNTING TO $552,226.80, WHICH WAS SECURED BY A STATUTORY LIEN UPON THE ALCOHOL INVOLVED IN THIS CASE.

At the time the alcohol involved in this case was seized, there was in force the Revenue Act of February 26, 1926, c. 27, Sec. 900, 44 Stat. 9, 104. This Act levied a basic [2] tax of $1.10 on each proof gallon on all distilled spirits that have been or that may be hereafter produced in or imported into the United States. Since the seized cargo of alcohol

[2] The tax to which the alcohol was subject on the date of seizure was a basic tax irrespective of the legal or illegal origin or existence of the subject-matter. *United States* v. *One Ford Coupe,* 272 U. S. 321, 328; *Various Items of Personal Property* v. *United States,* 282 U. S. 577, 579; *United States* v. *Constantine,* No. 40, October Term, 1935, decided December 9, 1935, at p. 4.

had been produced in the United States,[3] and consisted of 146,157 gallons of 192 proof, it came within the terms of the statute and was at the time of its seizure subject to a tax of $308,683.58.[4]

There is nothing in the record to indicate that this tax has ever been paid. The burden of proof to show that all the requirements of the law in relation to the payment of taxes have been complied with rested upon the claimant to this alcohol, R. S., Sec. 3333, as amended (U. S. C., Title 26, Sec. 1205), and no attempt has been made to meet this or similar burdens, as the District Judge forcibly remarked (R. 19). Indeed, what evidence there is would justify this Court in concluding, even without the benefit of the statutory presumption, that no tax had been paid. For, so far as appears, the containers of the alcohol did not bear appropriate stamps denoting the payment of the tax, Act of August 27, 1894, c. 349, Sec. 48, 28 Stat. 563 (U. S.

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[3] The claimant, both in his motion to dismiss the libel (R. 6) and in his answer (R. 11), admitted that the "146,157 gallons of alcohol were not imported into the United States of America." It is elementary that this admission in the pleadings binds the claimant. *White* v. *Mechanics Securities Corp.*, 269 U. S. 283, 302; *Pope* v. *Allis*, 115 U. S. 363, 370; *The Mount Everest*, 17 F. (2d) 478 (C. C. A. 5th, 1927). Nowhere in the record is there any evidence to the contrary, and so the inevitable inference is that the alcohol, not having been imported into the United States, was produced in the United States.

[4] This figure is arrived at by multiplying the number of gallons, 146,157, by the proof, 192/100, by the rate of tax, 1.10.

C., Title 26, Secs. 1152 (a) (2), 1197), either at the time the alcohol was seized (R. 9) or at the time the alcohol was sold subject to court order. (R. 303.)

The failure to pay the tax imposed by the Revenue Act of 1926 had one collateral consequence, which, although of no substantial significance in this particular case, should parenthetically be called to the attention of this Court. Subsequent to the seizure of the alcohol on December 12, 1932, but prior to the court's order of sale on November 22, 1934, Congress passed the Liquor Taxing Act of January 11, 1934, c. 1, Sec. 2, 48 Stat. 313 (U. S. C., Title 26, Sec. 1150. This amended the Revenue Act of 1926 so as to impose on distilled spirits that have been or that may be hereafter produced in or imported into the United States, in lieu of internal revenue taxes theretofore imposed, a tax of $2 per proof gallon. This new tax rate applies to the alcohol in this case, not only because the Liquor Taxing Act specifically covers distilled spirits that already had been produced in the United States, but also because R. S., Sec. 3254 (U. S. C., Title 26, Sec. 1150 (a) (3) provides that:

> All products of distillation, by whatever name known, which contain distilled spirits or alcohol, on which the tax imposed by law has not been paid, shall be considered and taxed as distilled spirits.

As a consequence of this valid increase in the tax rate (cf. *Milliken* v. *United States*, 283 U. S.

15; *Patton* v. *Brady,* 184 U. S. 608, 623), the total tax due on the alcohol is $552,226.80. However, this increase is of no substantial significance in the instant case, because the tax due under the former rate already amounted to $308,683.58, which is in excess of $264,559.18, the amount in the registry available for distribution. See the certificate of the clerk of the Circuit Court of Appeals, appended hereto, p. 40, *infra.*

The claim at least for the taxes due under the Revenue Act of 1926 [5] was fortified by a statutory lien that attached to the alcohol as soon as it was in existence and continued until the tax was paid. R. S., Sec. 3251 (U. S. C., Title 26, Secs. 1150 (d), 1158 (e) (1)); R. S., Sec. 3248 (U. S. C., Title 26, Secs. 1150 (c), 1150 (b) (1)); *United States* v. *One Ford Coupe,* 272 U. S. 321, 328; *Thompson* v. *United States,* 142 U. S. 471, 474; *United States* v. *Ulrici,* 111 U. S. 38, 42. And that statutory lien, like some other statutory liens, was, even without assessment, distraint, or other administrative proceedings, valid against all transferees, including bona fide [6] purchasers. *Beall* v. *White,* 94 U. S.

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[5] It may very well be that the lien created by R. S., Secs. 3248, 3251 was increased when the tax itself was increased by the Liquor Taxing Act of 1934. The point, however, is, as stated in the body of the brief, immaterial in this case, and need not now be considered by this Court.

[6] Perhaps there cannot be such a person as a bona fide purchaser. For the absence of stamps on the containers of the alcohol is notice to the world that the tax has not been paid and the alcohol is subject to forfeiture. R. S., Sec. 3289 (U. S. C., Title 26, Sec. 1155 (d)).

382, 386; *United States* v. *Turner,* Fed. Cas. No. 16,548 (C. C. S. D. Ohio); *Alkan* v. *Bean,* Fed. Cas. No. 202 (C. C. E. D. Wis.).

II

THIS TAX CLAIM HAS NEVER BEEN LOST BY AN ELECTION OF REMEDIES, BY LACHES, OR BY WAIVER

The respondent in the lower court and in his brief in opposition to the petition for certiorari suggests that the Government has lost its right to enforce this tax claim because of an election of remedies, laches and waiver. And the lower court has expressly rested its decision on the ground that the Government is barred by laches. It is submitted that none of these defenses to the claim for taxes is valid.

A. THE UNITED STATES IS NOT BARRED BY AN ELECTION OF REMEDIES

The respondent contends that the United States is now estopped to assert a claim for internal revenue taxes on account of these 146,157 gallons of alcohol, because the United States in its original libel elected to seek a forfeiture of said alcohol. But this contention of estoppel by election is unsound. The doctrine of estoppel by election, as stated by this Court in *Bierce* v. *Hutchins,* 205 U. S. 340, 346,

> is simply what its name imports, a choice, shown by an overt act, between two *in-*

consistent rights, either of which may be asserted by the will of the chooser alone.

There is nothing inconsistent between an assertion by the United States of a right to forfeit alcohol because it was transported in a vessel violating navigation and customs laws, and an assertion by the United States of a right to impose an excise tax lien on the alcohol because before it was so transported it had been produced in the United States.

The difference between the transactions upon which the Government's former cause of action was based, and the transactions upon which the Government's present cause of action is founded (and the consistency of the rights asserted by the Government) is shown by a careful analysis of the libel filed in the District Court, and a comparison of it with the Government's petition filed in the Circuit Court of Appeals.

The libel and amendment thereto (R. 2–4, 12) prayed a forfeiture of the alcohol on four different grounds: (1) that it was not included or described in the vessel's manifest and so was subject to forfeiture under the Tariff Act of 1930, Act of June 17, 1930, c. 497, Title IV, Sec. 584, 46 Stat. 590, 748 (U. S. C., Title 19, Sec. 1584); (2) that it contained more than one-half of one per centum of alcohol and had been imported into the United States without proper permit and so was subject to forfeiture under the Tariff Act of 1930, Act of June 17, 1930, c. 497, Title I, Sec. 1, Par. 814, 46 Stat. 590, 640

(U. S. C. Sup. VII, Title 19, Sec. 1001, Par. 814); (3) that, because the vessel carrying the merchandise had become subject to a penalty for violation of the customs-revenue laws, the merchandise itself was subject to forfeiture under the supposed authority of the Tariff Act of 1930, Act of June 17, 1930, c. 497, Title IV, Sec. 594, 46 Stat. 590, 751 (U. S. C., Title 19, Sec. 1594); and (4) that, because the vessel carrying the cargo was employed in a trade other than that for which she was licensed, to wit, the transportation of intoxicating liquor in violation of the National Prohibition Act, the cargo was subject to forfeiture under R. S., Sec. 4377 (U. S. C., Title 46, Sec. 325).

It is obvious that all of these grounds of forfeiture are based on alleged violations of the navigation and customs laws. They are not based even indirectly[7] on the internal revenue laws. The Government made no reference in its libel and introduced no evidence in the District Court with respect to the excise taxes due upon the domestic production of alcohol.

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[7] The Government did not seek forfeiture of the cargo on a ground that even collaterally involved the internal-revenue laws, as, for example, because the vessel carrying the cargo was employed in a trade other than that for which she was licensed, to wit, the transportation of contraband or smuggled distilled spirits on which the tax had not been paid. Cf. *United States* v. *Wischerth*, 68 F. (2d) 161 (C. C. A. 2d); *United States* v. *Corriveau*, 286 U. S. 530; *United States* v. *The Ruth Mildred*, 286 U. S. 67.

The petition presented to the Circuit Court of Appeals (R. 307–311), on the other hand, has no relation whatsoever to navigation or customs matters. It states a claim based upon internal revenue taxes. These taxes are excises due on account of production of the alcohol before it was ever transported in the DORIS. They are founded on a right separate and distinct from, and yet entirely consistent with, the rights hitherto asserted in the libel. Cf. *United States* v. *One Ford Coupe,* 272 U. S. 321, 326–327.

Under these circumstances, the doctrine of election of remedies is inapplicable and the United States is not barred by its libel or the proceedings consequent upon it [8] from now asserting this claim for internal revenue taxes. *Southern Pacific Co.* v. *Bogert,* 250 U. S. 483, 491; *Bierce* v. *Hutchins,* 205 U. S. 340, 346.

B. THE UNITED STATES IS NOT BARRED BY LACHES

The respondent has argued that the claim of the United States is in any event barred by laches, and

[8] The decree on the libel entered by the District Court, which was subsequently reversed and ordered to be dismissed by the Circuit Court of Appeals, provided for forfeiture based upon the fourth ground in the libel, that is, that the alcohol was subject to forfeiture because it had been carried on a vessel employed in a trade other than that for which she was licensed, to wit, the transportation of intoxicating liquor in violation of the National Prohibition Act. Neither the District Court nor the Circuit Court of Appeals has entered any decree, even of dismissal, with respect to the other three grounds for which forfeiture was prayed.

this argument was accepted in the lower court as a valid defense. (R. 325–326.) But it is submitted that the conclusion of the lower court is unsound.

A claim based on internal revenue taxes, especially on account of distilled spirits produced in the United States[9] is clearly a non-maritime claim. *The Bradich Johnson,* Fed. Cas. No. 1770 (S. D. Ala.), reversed on other grounds, Fed. Cas. No. 798 (C. C. S. D. Ala.). As such, it could not have been set forth, even when joined with a strictly maritime claim, in a libel in the admiralty. *Steamboat Orleans* v. *Phoebus,* 11 Pet. 175, 182; *Bruce* v. *Murray,* 123 Fed. 366 (C. C. A. 9th); *The Guiding Star,* 1 Fed. 347 (D. Ky.); *Pratt* v. *Thomas,* Fed. Cas. No. 11,377 (D. Maine). This being so, the United States pursued the only proper course in excluding from its libel its non-maritime lien for taxes.

Even if, as a matter of admiralty law, the Government had been free to set forth in its libel a claim based upon an internal revenue tax, it was altogether justified in not doing so in this case, and, therefore, no laches can equitably be attributed to it. At the outset of the case, the Government proctor could foresee only three different situations: first, a forfeiture of the cargo, as prayed; second, a return of the cargo to the claimant; and, third, an interlocutory sale with appropriate disposition of the proceeds. In each situation, he was war-

[9] For proof that the distilled spirits were produced in the United States, see footnote 3, p. 12, *supra.*

ranted in assuming that the lien for taxes would be thoroughly protected. If a forfeiture of the cargo were decreed, the Government would get the entire cargo of alcohol or its proceeds. If, on the other hand, the libel were dismissed and the cargo returned to the claimant, the Government would still have its statutory lien for internal revenue taxes valid against the claimant and all his successors in title. R. S., Sec. 3251; *supra,* pp. 14–15. Finally, if, by any chance, the court, before making a final disposition of the libel, ordered an interlocutory sale of the cargo, the proctor had every reason to suppose that the court would follow the express words of R. S., Sec. 3334, as amended by Act of March 1, 1879, c. 125, Sec. 5, 20 Stat. 340 (U. S. C., Title 26, Sec. 1154) and sell the alcohol subject to taxes.

Moreover, if the doctrine of laches would otherwise be a bar, it should not be applied to the Government when acting in its sovereign capacity to collect revenue. Cf. *Chesapeake & Delaware Canal Co.* v. *United States,* 250 U. S. 123; *United States* v. *Michigan,* 190 U. S. 379; *San Pedro &c. Co.* v. *United States,* 146 U. S. 120, 135.

C. THE UNITED STATES IS NOT BARRED BY WAIVER

In the lower court and in his brief in opposition to the petition for certiorari, the respondent contended that the United States had entered into an agreement whereby it waived its claim for taxes due on account of the alcohol.

The agreement to which the respondent refers is set forth in a recital in the order of the Circuit Court of Appeals of December 4, 1934, fixing the terms under which the marshal was to sell the alcohol. (R. 299–300.) This recital reads as follows:

> * * * the court having heard the argument of counsel and directed an agreement as to such terms, and the annexed terms of sale having been presented in open court as representing *the terms of sale agreed upon;*
>
> It is on this 4th day of December A. D.. 1934, ordered, adjudged, and decreed * * *. (Italics added.)

Before discussing this particular order and the recital therein, it will be helpful to review the pleadings of the parties and the orders of the lower court immediately prior thereto. This review will put the order of December 4, 1934, in its proper setting and will better enable us to understand it.

The first important step leading up to the order of December 4, 1934, was taken by the claimant on November 19, 1934. On that day he filed a petition (R. 291–295) representing that because the barge *Doris,* which contained the alcohol, had been sold, it was imperative to remove the alcohol from the barge and sell it. The petition concluded with a prayer (R. 293) for an order, pursuant to Admiralty Rule 11, directing that the alcohol be sold and—

> the proceeds of sale * * * be deposited and held in the registry of this court and substituted in the place and stead of the 146,157 gallons of alcohol * * * and that all further proceedings herein shall be against said proceeds of sale deposited in the registry of this court * * *

The Government filed an answer objecting to this petition on the ground that the Circuit Court of Appeals had no jurisdiction to order any interlocutory sale. (R. 296–297.) The Government did not at the same time mention the question of internal revenue taxes, presumably because it assumed that if the petition were granted and a sale were ordered, the court, as a matter of course, would provide either that the alcohol would be sold subject to taxes as provided by R. S., Sec. 3334, as amended by Act of March 1, 1879, c. 125, Sec. 5, 20 Stat. 340 (U. S. C., Title 26, Sec. 1154), or that the proceeds when received would be subject to taxes.

And apparently the Government's second assumption proved to be sound, for when the court on November 22, 1934, ordered (R. 297–298) the sale, it expressly—

> ordered, adjudged, and decreed, that said proceeds of sale so deposited in the registry of this court, shall *be substituted in the place and stead of said 146,157 gallons of alcohol,* and that all further proceedings herein shall be against said proceeds of sale. (Italics added.)

This must have meant that the proceeds would be subject to whatever liens existed with respect to the alcohol. For the decree is in the common form authorized by Admiralty Rule 40, which has been universally interpreted as transferring from the original *res* to the proceeds any liens which exist. *The Lottawanna,* 20 Wall. 201, 211, 221; *Schuchardt* v. *Babbidge,* 19 How. 239, 241; *Clifford* v. *Merritt-Chapman & Scott Corp.,* 57 F.(2d) 1021 (C. C. A. 5th).

Moreover, this interpretation is the only one possible in this case. For at the time the Circuit Court of Appeals issued this order of November 22, 1934, it had already reversed, with a direction to dismiss, the District Court's decree of forfeiture (R. 290, 291). ([redacted]) Thus the only further proceedings left were proceedings to enforce liens.

Having read the court's order of November 22, 1934, as preserving all liens against the proceeds, the United States Attorney felt that he was on safe ground so far as taxes were concerned. With this justifiable optimism, he reached the crucial agreement as to "the terms of sale." This is the agreement which is recited in the order of December 4, 1934, and the only evidence upon which the respondent bases his contention that the Government has waived all its rights to taxes. But it is submitted that the order cannot properly be so construed.

It will be recalled that the order (R. 300) recites that:

> * * * the court having heard the argument of counsel and directed an agreement as to such terms, and the annexed terms of sale having been presented in open court as representing *the terms of sale agreed upon;*
>
> It is on this 4th day of December A. D. 1934, ordered, adjudged, and decreed * * *. (Italics added.)

It seems too clear for controversy that this agreement was merely as to "the terms of sale." There was no agreement as to the proceeds of the sale, or as to internal revenue taxes generally.

And this strict, narrow interpretation of the agreement recited in this order was, at least until recently, shared by one of claimant's counsel. For, when the United States at the last term of Court filed a petition for certiorari to review the order of the Circuit Court of Appeals confirming the sale of the alcohol (October Term, 1934, No. 621), one of this respondent's former counsel, and one who had actually been present when the order was entered (R. 299) stated (brief, pp. 12–13) in his Brief in Opposition filed on behalf of Reo Distillers, Inc., the purchasers at the sale, that—

> In view of these pleadings and in view of the government's consent to a sale free of liens and charges, the purchaser had the right to expect that if libellant were entitled to any claim by reason of taxes or otherwise, such claim would be asserted against the

> funds in the Registry of the Court. Further, the United States Circuit Court of Appeals in confirming the sale, merely carried out the provisions of the conditions and terms agreed upon between libellant and claimant, and that Court, as well as the purchaser, had a right to assume that any claim of the libellant, if one was existent, would be exerted against the purchase price realized on the sale of the subject matter, which purchase price was by decree and agreement between the parties substituted for the res.
>
> Under the cases we have cited the government cannot now invalidate the proceedings or set aside the purchaser's title to these goods. *Its claim, if any, must be enforced against the proceeds of sale.*

Furthermore, it is significant that the Circuit Court of Appeals, before which all these proceedings occurred, and which would have been cognizant of any waiver if it had occurred, has not found any waiver such as is claimed. Its final order denying the Government's petition for taxes rests squarely on laches, and does not advert to waiver. (R. 325–326.) The refusal of the Circuit Court of Appeals to construe the recitals in its own earlier order of December 4, 1934, as embodying a waiver by the Government of its tax claim has peculiar significance. For it accords with the recognized principle that statements or acts of the Government or its agents will be narrowly construed to avoid imputing a waiver or an estoppel to the United States. *Utah* v. *United States,* 284 U. S. 534, 545; *Sani-*

tary District of Chicago v. *United States,* 266 U. S. 405, 427.

Finally, we contend that even if the United States Attorney in this case did purport to waive the rights of the United States to be paid its internal revenue taxes out of the proceeds of this sale, "he was obviously without authority to dispose of the rights of the United States * * * and could not estop it from asserting rights which he could not surrender." *Utah* v. *United States,* 284 U. S. 534, 545–546; *Utah Power & Light Co.* v. *United States,* 243 U. S. 389, 408, 409; *Alkan* v. *Bean,* Fed. Cas. No. 202 (C. C. E. D. Wis.).

III

THE STATUTORY LIEN, WHICH FORMERLY WAS UPON THE ALCOHOL, NOW IS UPON THE PROCEEDS OF THE ALCOHOL; AND THIS LIEN, HAVING BEEN PROPERLY ASSERTED AND PROVED, SHOULD NOW BE SATISFIED, PRO TANTO, FROM THESE PROCEEDS

As pointed out at pp. 22–23 *supra,* the Circuit Court of Appeals, in ordering the sale of the alcohol, provided, in harmony with Admiralty Rule 40, that the proceeds of the sale should be "substituted in the place and stead of said 146,157 gallons of alcohol." (R. 297–298.) This order transferred the liens which were upon the alcohol to the proceeds. *The Lottawanna,* 20 Wall. 201; *The Siren,* 7 Wall. 152, 159; *Schuchardt* v. *Babbidge,* 19 How. 239; Benedict, *Admiralty* (5th ed.) Sec. 453.

One of the liens so transferred was the valid lien of the United States for internal revenue taxes, which, as already contended, had not been lost by an election of remedies, laches or waiver. This lien,

though not a maritime lien, could, consistently with the admiralty practice, be asserted against the proceeds in the registry, *The J. E. Rumbell,* 148 U. S. 1, 15; *The Lottawanna, supra*; Benedict, *Admiralty* (5th ed.) Secs. 453, 14. And it was so asserted against the proceeds by petition in the manner authorized by Admiralty Rule 42. *The J. E. Rumbell, supra; The Lottawanna, supra; Schuchardt* v. *Babbidge, supra; The Two Marys,* 12 Fed. 152 (S. D. N: Y.).

This petition was supported by an affidavit of the Collector of Internal Revenue for the Fifth Collection District of New Jersey reciting that the taxes on this alcohol had not been paid (R. 310–311). Subsequently notices of levy, with similar recitals, were executed and filed with the clerk of the lower court by the Collectors of Internal Revenue of the First Collection District of New Jersey (R. 312–320) and of the First Collection District of Pennsylvania (R. 320–325). Each of these statements from a tax collector "amounts to an official certificate concerning a public matter presumably within his official knowledge, and * * * ought to be accepted as sufficient evidence of the fact, at least in the absence of special challenge." *Ex parte State of New York, No. 2,* 256 U. S. 503, 509.

No such special challenge has been made. The petition for taxes stands unanswered by any pleading of the respondent, other than his apparently oral motion to dismiss. On the basis of this petition and a record leaving no doubt that taxes of

$552,226.80 are due and unpaid (R. 9, 303), see also pp. 12–13, *supra,* this Court, we submit, should reverse the order of the lower court and direct that an order be entered by that court providing that the proceeds of the sale of alcohol now in its registry [10] be paid over in satisfaction *pro tanto* of the internal revenue taxes owing to the United States on account of said alcohol.

Such summary proceedings in admiralty causes are provided for by Admiralty Rule 42, and a mandate of the sort we urge is consistent with the mandates of this Court in *United States* v. *Fossat,* 20 How. 413, 427; *Chicago, Milwaukee & St. Paul Ry. Co.* v. *Hoyt,* 149 U. S. 1, 5.

IV

THE PROCEEDS ARE SUBJECT NOT ONLY TO A VALID *STATUTORY* LIEN, BUT ALSO TO AN *EQUITABLE* LIEN FOR TAXES AMOUNTING TO $552,226.80, INASMUCH AS THE LOWER COURT, BY ITS INTERLOCUTORY ORDER OF SALE, DEPRIVED THE UNITED STATES OF ITS USUAL REMEDIES AGAINST THE ALCOHOL FOR THE COLLECTION OF THESE TAXES.

As an alternative to the *statutory* lien upon the proceeds in the registry of the lower court, we contend that there is an *equitable* lien of $552,226.80 for internal revenue taxes.

Prior to the lower court's orders directing (R. 297), fixing the terms of (R. 299), and confirming (R. 302) the sale, the Government had two methods, in addition to the statutory lien method

[10] The proceeds of the sale, of course, remained in the Circuit Court of Appeals and did not follow the cause into this Court. *The Lottawanna, supra,* at p. 225.

already described, by which it might have collected the internal revenue taxes due on account of this alcohol. First, the Government had a right to forfeit the alcohol, even after it had been transferred to a bona fide purchaser, so long as it continued to be stored in a container not stamped in accordance with the internal revenue laws and regulations. Act of January 11, 1934, c. 1, Title II, Sec. 206, 48 Stat. 317 (U. S. C., Title 26, Sec. 1152 (f)). And, second, the Government had a right to collect the internal revenue taxes imposed by law from whoever purchased distilled spirits sold by order of court. R. S., Sec. 3334, as amended by Act of March 1, 1879, c. 125, 20 Stat. 340 (U. S. C., Title 26, Sec. 1154).

By the procedure it adopted in selling the alcohol, the lower court deprived the Government of these two remedies. And this deprivation resulted in making bidders at the sale offer more, thus ultimately swelling the amount realized from the sale and now deposited in the registry. For, of course, a prospective purchaser was willing to bid more for the alcohol when he was told by the lower court (R. 303) that—

> the said alcohol or spirits intended for beverage purposes shall be treated by the United States Government and any of its departments as tax paid, irrespective of the lack of any stamp or tax certificate affixed thereto on the respective containers in which said alcohol may be deposited or contained.

Since this order was in substance the same as an injunction forbidding the Government to collect taxes after the sale, the Government is entitled to receive from the proceeds *in custodia legis* the amount of taxes which, except for the restraint of the court below, could have been collected. This accords with the common practice in equity receiverships. *Marshall* v. *New York,* 254 U. S. 380, 385; *In re Tyler,* 149 U. S. 164; *Colonna's Shipyard* v. *Rowe,* 14 F. (2d) 267 (C. C. A. 4th); *First National Bank* v. *Ewing,* 103 Fed. 168, 188–189 (C. C. A. 5th); *Union Trust Co.* v. *Great Eastern Lumber Co.,* 248 Fed. 46, 50 (C. C. A. 5th). The principle, justifying this procedure, was clearly stated in the last cited case, in which, at p. 50, it was said to be—

> the recognized duty of the court, which had displaced the usual remedies for the collection of taxes by the receivership, to provide for the payment of taxes out of the proceeds of the sale, and not to remit the tax authorities to a belated use of their remedies against the property after it had passed out of the court's possession into that of the purchaser, * * *.

This principle has clear application in this cause, even though it arises in an admiralty court. The rights of which the Government was deprived by the court's order of sale were not merely *in personam* against this claimant Rizzo. They were rights attached to the alcohol itself in such a way as to affect any person who bought the alcohol at a judicial sale conducted in the manner provided

by statute, or any person who at any time had possession of the alcohol in unstamped containers. Vested rights of this sort are similar to other rights recognized by admiralty courts in the distribution of proceeds. Cf. *The Lottawanna,* 21 Wall. 558, 582; *The Duchess,* 201 Fed. 783 (E. D. N. Y.); *The Advance,* 63 Fed. 704 (S. D. N. Y.); *Town* v. *The American Banner,* Fed. Cas. No. 14,112a (S. D. N. Y.); Benedict, *Admiralty,* (5th ed.) Sec. 453. And such rights are, under Admiralty Rule 42, enforceable upon petition by summary proceedings as pointed out at p. 28, *supra.*

CONCLUSION

For the reasons advanced, it is submitted that the order of the court below should be reversed, and a decree entered ordering that court to pay over to the United States the proceeds of the sale of the 146,157 gallons of alcohol in satisfaction *pro tanto* of the internal revenue taxes owing to the United States on account of said alcohol.

Respectfully submitted,

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DECEMBER 1935.

APPENDIX

The Revenue Act of February 26, 1926, c. 27, Section 900, 44 Stat. 9, 104, provides:

Subdivision (a) of section 600 of the Revenue Act of 1918, as amended, is amended to read as follows:

"SEC. 600. (a) There shall be levied and collected on all distilled spirits now in bond or that have been or that may be hereafter produced in or imported into the United States, in lieu of the internal-revenue taxes now imposed thereon by law, an internal-revenue tax at the following rates, to be paid by the distiller or importer when withdrawn, and collected under the provisions of existing law:

* * * * *

"(3) On and after January 1, 1928, $1.10 on each proof gallon or wine gallon when below proof and a proportionate tax at a like rate on all fractional parts of such proof or wine gallon.

"(4) On and after the enactment of the Revenue Act of 1926, on all distilled spirits which are diverted to beverage purposes or for use in the manufacture or production of any article used or intended for use as a beverage there shall be levied and collected a tax of $6.40 on each proof gallon or wine gallon when below proof, and a proportionate tax at a like rate on all fractional parts of such proof or wine gallon, to be

paid by the person responsible for such diversion. If a tax at the rate of $2.20, $1.65, or $1.10 per proof or wine gallon has been paid upon such distilled spirits a credit of the tax so paid shall be allowed in computing the tax imposed by this paragraph.

* * * * *

The Act of January 11, 1934, c. 1, Section 2, 48 Stat. 313, amending the Revenue Act of 1926, provides in paragraphs 3 and 4 as follows:

(3) On or after January 1, 1928, and until the effective date of Title I of the Liquor Taxing Act of 1934, $1.10 on each proof gallon or wine gallon when below proof and a proportionate tax at a like rate on all fractional parts of such proof or wine gallon; and

(4) On and after the effective date of Title I of the Liquor Taxing Act of 1934, $2.00 on each proof gallon or wine gallon when below proof and a proportionate tax at a like rate on all fractional parts of such proof or wine gallon.

Revised Statutes, Sec. 3254 (U. S. C., Title 26, Sec. 1150 (a) (3)) provides:

All products of distillation, by whatever name known, which contain distilled spirits or alcohol, on which the tax imposed by law has not been paid, shall be considered and taxed as distilled spirits.

Revised Statutes, Sec. 3333 as amended (U. S. C., Title 26, Sec. 1205) provides:

Whenever seizure is made of any distilled spirits found elsewhere than in a distillery or distillery warehouse, or other warehouse for distilled spirits authorized by law, or than in the store or place of business of a rectifier, or of a wholesale liquor dealer, or

than in transit from any one of said places; or of any distilled spirits found in any one of the places aforesaid, or in transit therefrom, which have not been received into or sent out therefrom in conformity to law, or in regard to which any of the entries required by law to be made in the books of the owner of such spirits, or of the storekeeper-gauger, wholesale dealer, or rectifier, have not been made at the time or in the manner required, or in respect to which the owner or person having possession, control, or charge of said spirits has omitted to do any act required to be done, or has done or committed any act prohibited in regard to said spirits; the burden of proof shall be upon the claimant of said spirits to show that no fraud has been committed, and that all the requirements of the law in relation to the payment of the tax have been complied with.

The Act of August 27, 1894, c. 349, Sec. 48, 28 Stat. 563 (U. S. C., Title 26, Secs. 1152 (a) (2), 1197) provides:

That on and after the passage of this Act there shall be levied and collected on all distilled spirits in bond at that time, or that have been or that may be then or thereafter produced in the United States, on which the tax is not paid before that day, a tax of one dollar and ten cents on each proof gallon, or wine gallon when below proof, and a proportionate tax at a like rate on all fractional parts of such proof or wine gallon: *Provided,* That in computing the tax on any package of spirits all fractional parts of a gallon, less than one tenth, shall be excluded.

The Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall prescribe and furnish suit-

able stamps denoting the payment of the internal-revenue tax imposed by this section; and until such stamps are prepared and furnished, the stamps now used to denote the payment of the internal-revenue tax on distilled spirits shall be affixed to all packages containing distilled spirits on which the tax imposed by this section is paid; and the Commissioner of Internal Revenue shall, by assessment or otherwise, cause to be collected the tax on any fractional gallon contained in each of such packages as ascertained by the original gauge, or regauge when made, before or at the time of removal of such packages from warehouse or other place of storage; and all provisions of existing laws relating to stamps denoting the payment of internal-revenue tax on distilled spirits, so far as applicable, are hereby extended to the stamps provided for in this section.

That the tax herein imposed shall be paid by the distiller of the spirits, on or before their removal from the distillery or place of storage, except in case the removal therefrom without payment of tax is authorized by law; and (upon spirits lawfully deposited in any distillery warehouse, or other bonded warehouse, established under internal-revenue laws) within eight years from the date of the original entry for deposit in any distillery warehouse, or from the date of original guage of fruit brandy deposited in special-bonded warehouse, except in case of withdrawal therefrom without payment of tax as authorized by law.

Revised Statutes, Sec. 3251, provides in part:

Every proprietor or possessor of, and every person in any manner interested in the use of, any still, distillery, or distilling apparatus, shall be jointly and severally

liable for the taxes imposed by law on the distilled spirits produced therefrom, and the tax shall be a first lien on the spirits distilled, the distillery used for distilling the same, the stills, vessels, fixtures, and tools therein, the lot or tract of land whereon the said distillery is situated, and on any building thereon from the time said spirits are in existence as such until the said tax is paid.

Revised Statutes, Sec. 3248, provides:

Distilled spirits, spirits, alcohol, and alcoholic spirit, within the true intent and meaning of this act, is that substance known as ethyl alcohol, hydrated oxide of ethyl, or spirit of wine, which is commonly produced by the fermentation of grain, starch, molasses, or sugar, including all dilutions and mixtures of this substance; and the tax shall attach to this substance as soon as it is in existence as such, whether it be subsequently separated as pure or impure spirit, or be immediately, or at any subsequent time, transferred into any other substance, either in the process of original production or by any subsequent process.

Revised Statutes, Sec. 3289, provides:

All distilled spirits [illegible]d in any cask or package containing five gallons or more, without having thereon each mark and stamp required therefor by law, shall be forfeited to the United States.

Revised Statutes, Sec. 3334 as amended (U. S. C., Title 26, Sec. 1154) provides:

Except as provided in section 1324, all distilled spirits forfeited to the United States, sold by order of court, or under process of distraint, shall be sold subject to tax; and the purchaser shall immediately, and be-

fore he takes possession of said spirits, pay the tax thereon. If any tax-paid stamps are affixed to any cask or package so condemned, such stamps shall be obliterated and destroyed by the collector or marshal after forfeiture, and before such sale: *Provided*, That in all cases wherein it shall appear that any distilled spirits offered for sale on distraint for taxes, where the taxes on such spirits have not been paid, or offered for sale for the benefit of the United States as forfeited spirits under order of court or under proceeding pursuant to section 1624, will not, by reason of such spirits being below proof, bring a price equal to the tax due and payable thereon, but will bring a price equal to, or greater than, the tax on said spirits, computed only upon the proof gallons contained in the packages, without regard to the greater number of wine gallons contained therein, then, and in such case, upon sale being so made, tax-paid stamps to the amount required to stamp such spirits as if the tax thereon were only on the proof gallons thereof, may, under such rules and regulations as the Commissioner shall prescribe, be used by the collector making such sale, or furnished by a collector to a United States marshal, or to any other Government officer making such sale for the benefit of the United States, without making payment for said stamps so used or delivered. Any collector using or furnishing stamps in manner aforesaid, on presenting vouchers satisfactory to the Commissioner, shall be allowed credit for the same in settling his stamp account with the department. In such cases, the officer selling the distilled spirits shall affix, or cause to be affixed, to the same the tax-paid stamps so provided,

and shall write across the face of such stamps the true number of proof and wine gallons contained in the package, the amount of tax actualy paid thereon, and also the words "Affixed under provisions of act of March 1, 1879."

The Act of January 11, 1934, c. 1, Title II, Sec. 206, 48 Stat. 317 (U. S. C., Title 26, Sec. 1152f), provides:

> All distilled spirits found in any container required to bear a stamp by this title, which container is not stamped in compliance with this title and regulations issued thereunder, shall be forfeited to the United States. Distilled spirits placed in such containers prior to the effective date of this title shall not be subject to this section until the expiration of 10 days after the effective date of this title, nor (when it is established that application for stamps therefor was made within the proper time) until such stamps are received by the applicant.

Admiralty Rule No. 11 provides:

> In all cases where any goods or other things are arrested, if the expense of keeping the same is excessive or disproportionate, or if the same are perishable, or are liable to deterioration, decay, or injury, by being detained in custody pending the suit, the court may, on the application of either party, order the same or any portion thereof to be sold; and the proceeds, or so much thereof as shall be full security to satisfy any decree, to be brought into court to abide the event of the suit; or the court may, on the application of the claimant, order a delivery thereof to him, either on the filing of a written agreement of the parties or their

proctors of record to that effect, or on a due appraisement, to be had under its direction, unless the value has been agreed to in writing by the parties or their proctors of record, on the claimant's depositing in court so much money as the court shall order, or on his giving a stipulation, with sufficient sureties or an approved corporate surety, in such sum as the court shall direct or as shall be agreed upon in writing by the parties or their proctors of record, conditioned to abide by and pay the money awarded by the final decree rendered by the court, or any appellate court, if any appeal intervenes, not to exceed however in any event such agreed or appraised value with interest at six per cent. per annum and costs, as the one or the other course shall be ordered by the court.

Admiralty Rule No. 40 provides:

All sales of property under any decree of admiralty shall be made by the marshal or his deputy, or other proper officer assigned by the court, where the marshal is a party in interest, in pursuance of the orders of the court; and the proceeds thereof, when sold, shall be forthwith paid into the registry of the court by the officer making the sale, to be disposed of by the court according to law.

Admiralty Rule No. 42 provides:

Any person having an interest in any proceeds in the registry of the court shall have a right, by petition and summary proceedings, to intervene *pro interesse suo* for delivery thereof to him, and on due notice to the adverse parties, if any, the court shall and may proceed summarily to hear and decide thereon, and to decree therein according to law and justice. And if such petition or claim shall be deserted, or on a hearing, be

dismissed, the court may, in its discretion, award costs against the petitioner in favor of the adverse party.

CERTIFIED STATEMENT OF CLERK OF CIRCUIT COURT OF APPEALS, FOR THE THIRD CIRCUIT, AS TO DEPOSIT ON MARCH 12, 1935, OF THE PROCEEDS OF SALE

UNITED STATES OF AMERICA,
Eastern District of Pennsylvania,
Third Judicial Circuit } Sct.

I, Wm. P. Rowland, Clerk of the United States Circuit Court of Appeals for the Third Circuit, DO HEREBY CERTIFY that on March 12, 1935 I received from the United States Marshal for the District of New Jersey the sum of $264,559.18, being proceeds resulting from the sale of alcohol made pursuant to the order of this Court of November 22, 1934 in the case of Frank Rizzo, Claimant of 146,157 gallons of alcohol, appellant, vs. United States of America, libellant-appellee, No. 5247; which sum was by me on March 13, 1935, deposited in the Registry of this Court, where it at present is and remains.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this 26th day of November, in the year of our Lord one thousand nine hundred and thirty-five and of the Independence of the United States the one hundred and sixtieth.

[SEAL] WM. P. ROWLAND,
Clerk of the U. S. Circuit Court of Appeals, Third Circuit.

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CHARLES ELMORE CROPLEY

Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

vs.

FRANK RIZZO, Claimant of 146,157 Gallons of Alcohol,
Respondent.

272

BRIEF OF CLAIMANT-RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

MINTURN & WEINBERGER, Esqs.,
Attorneys for Claimant-Respondent.

LOUIS HALLE,
MILTON R. KROOPF,
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Of Counsel.

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Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,
vs.
FRANK RIZZO, Claimant of 146,157 Gallons of Alcohol,
Respondent.

BRIEF OF CLAIMANT-RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

The Circuit Court of Appeals did not err:

I. In making the order of June 4, 1935 complained of by the petitioner, for the following reasons:

1. By the adjudication of the libel suit, every claim which might have been made by any of the parties to the suit is deemed to have been made and adjudicated.

2. The petitioner never asserted a lien against the alcohol.

3. It was party to the sale of the alcohol free of any lien.

4. The proceeds of the sale represents a fund, no part of which are tax proceeds.

5. A previous petition to this court to review the order of the Circuit Court of Appeals ordering and confirming the sale of the alcohol

"(a) Free and clear of and from any and all claims of any kind or character;

(b) Free of all Government taxes or tax liens of any kind or character;

(c) Free of all customs duties"

was denied.

United States of America v. Frank Rizzo, claimant, No. 621, October Term, 1934.

6. The final decree which provides for the delivery of the proceeds of sale to the claimant was not attacked and its validity was never questioned, and no appeal was taken by the petitioner from said decree.

The writ ought not to be granted.

1. The order of June 4th, 1935, in aid and execution of the final decree rendered October 2, 1934 was proper.

a. The final decree of the District Court drawn and caused to be entered on motion of the proctor for the libellant on June 29th, 1933 (Rec. page 52) provided that upon reversal, "the said proceeds of sale so deposited as aforesaid, in the Registry of this court, shall become the property of and be delivered to the said claimant."

2. The record is devoid of any claim for any alleged tax due, or non-paid against the *res* sold.

(See *Matoil Service & Transport. Co.* v. *U. S.*, October Term, 1934, No. 410, Certiorari denied.)

3. All claims of any interested party in the *res* should have been asserted in the cause after the monition issued, and the world was put upon notice that the court held custody of the alcohol, subject to any claim of any interested party therein. The petitioner claimed forfeiture under the Customs and Navigation Laws and never questioned the validity and correctness of the final decree of the Circuit Court of Appeals.

4. Each and every claim that the libellant had to the subject matter of the libel is presumed to have been raised under the libel, and it may not raise a claim after final decree, the validity of which is not attacked, else

litigation would never terminate and the final decrees of courts would not speak with finality, but would be equivocal and uncertain, and the foundation of the court's powers would be shattered.

5. It is anomalous for the petitioner to make claim for a basic tax after final adjudication and in the face of a specific consent and agreement by stipulation that the cargo of alcohol "is to be sold free and clear of all claims of any kind or character," and sold with "no representation or guarantee of the alcohol as to quality, proof or otherwise."

With these terms agreed upon between the parties to the cause, the Circuit Court of Appeals was induced to make the order carrying out the terms of the said stipulation (Rec. 524).

6. The attack upon the order of sale and the order of confirmation pursuant to the said consent of both parties hereto failed when the petition for the writ of certiorari was denied in *United States* v. *Rizzo, supra.*

Thus it appears that no claim was ever asserted in the libel proceedings for any basic tax. It further appears that no taxes were to be paid by the purchaser of the cargo when sold by the Marshal under the stipulation between the parties hereto. It is paradoxical to claim that although the merchandise which was sold free of any tax and without any claim or any lien of any kind thereon, that the proceeds realized upon the sale could possibly represent any portion of tax proceeds.

7. Each and every claim which the libellant could possibly assert in order to ground forfeiture of the alcohol and in order to assert title in its own behalf, which of course would include a lien for taxes, is deemed, as a matter of law, to have been asserted even though such may be contrary to fact.

8. There is nothing for this court to review which has not already been presented in the previous petitions by the libellant. The right of the Circuit Court of Appeals to enter the order directing the sale of the alcohol free of any claims of any kind or character, including the alleged tax, has been challenged by an attempt to invoke this court's supervisory jurisdiction over the orders and decrees of the Circuit Court of Appeals. But on the showing made that the orders were consented to by a stipulation, and on the further showing that the final decree was conceded to be correct, coupled with the further showing that no tax claim was made under the libel, this court denied certiorari. The claim for a tax was never made before a competent court of original jurisdiction to hear and determine it on any issues drawn and evidence taken.

It is well settled by this court that it will not consider a question which had not been properly presented and raised in the court below.

Badger v. *Ranlett,* 106 U. S. 255, etc.

ARGUM

The libellant in its petition at page 5 states:

> "A petition for a writ of certiorari, wherein was questioned the authority of the Circuit Court of Appeals to include such provisions in its order of confirmations, was denied by this court on January 21, 1935.
>
> *United States* v. *Frank Rizzo,* Claimant of 146,157 Gallons of Alcohol, October Term, 1934, No. 621."

The provisions referred to are those ordering the sale of the cargo of alcohol free and clear of all claims of any kind or character.

In effect, this petition seeks the precise relief which was requested when previously this court denied the libellant's petition, No. 621, for the petitioner now asks that

this court find as a fact that the proceeds of the sale of the alcohol which was sold free of tax, nevertheless is stamped with a tax lien.

It is suggested on page 2 of the Government's Brief that the court ordered the sale free of Internal Revenue Taxes and then the Government propounds as a question:

> "1. Has the Government lost its right to assert against the proceeds of sale a claim for Internal Revenue Taxes due on the alcohol before the sale by not asserting such claim in its libel for forfeiture?"

On the record before this court this question is not properly presented. The question pre-supposes that taxes were due on the alcohol, while the record discloses that the alcohol, by agreement of the parties was to be sold free and clear of any claim of any character. There is no denial of such agreement, the petitioner stating, however;

At page 11, Petitioner's Brief:

> "The agreement to the terms of sale, referred to in the court's order of December 4, 1934, did not indicate or imply any relinquishment by the Government or the claimant of their respective rights, or claimant's to the proceeds of sale."

This statement, of course, is a complete confession by the petitioner that the terms of sale were ordered by the court upon agreement.

The second question sought to be presented by the Government reads as follows:

Page 2, Government's Brief:

> "Has the Government lost its right to assert against the proceeds of sale a claim for Internal Revenue Taxes *due* on the alcohol, by awaiting the outcome of the forfeiture proceeding before asserting the claim for tax?"

This question is infected with the same vice that infects the first question.

The third and last question which is sought to be presented reads as follows:

> Page 2, Government's Brief:
>
> "Did the Government lien which attached to the alcohol before sale thereafter attach to the proceeds of sale?"

This question, too, pre-supposes that there was a tax due and unpaid upon the said alcohol by reason of which a lien existed thereon. The record, however, indicates quite clearly that there was no lien of any character, no claim of any kind against the alcohol, and hence, there could be no lien which could attach to the proceeds of the sale of such alcohol.

And as stated by this court in *Heine* v. *Board of Levee Commissioners,* 22 Law Ed., 225 at p. 226:

> "And it is too clear for argument that taxes not assessed are no liens, and that the obligation to assess taxes is not a lien on the property on which they ought to be assessed."

After agreeing to the terms of sale, after specifically relying upon the definite causes of forfeiture pleaded in the libel, after an adjudication in favor of the claimant, when the entire world had been put upon notice of the seizure *in rem,* and when the seizor was the Government itself, the Government now makes a claim for an alleged tax, which by the Government's own stipulation it did not have, nor did it purport to assert or make claim for, and this after the Supreme Court had denied the Government's application for a writ of certiorari.

See

Florentine v. *Barton,* 2 Wall. 210, 216;

Beauregard v. *City of New Orleans,* 18 Howe. 497, 502;

Miller v. *United States,* 11 Wall. 268, 294;
Grignon's Lessee v. *Astor,* 2 Howe 319, 343;
Daily v. *Doe,* 3 Fed. 903.

The petitioner claims that the Circuit Court of Appeals erred:

Page 7:

"1. In holding in effect that the United States failed to assert a claim for taxes on the alcohol by not asserting it in the original libel for forfeiture."

There is no question of waiver in the case at bar. By the adjudication of the libel suit, every claim which might have been made by any of the parties to the suit is deemed to have been made and adjudicated.

Northern Pacific Railway Co. v. *Slaght,* 205 U. S. 122, 51 Law Ed. 738;
Baltimore Steamship Co. v. *Phillips,* 274 U. S. 316, 71 Law Ed. 1069;
Steele v. *United States,* 267 U. S. 505, 69 Law Ed. 761;
The San Rafael, 149 Fed. 893;
Shinkle v. *Vickery,* 117 Fed. 916;
The New Brunswick, 125 Fed. 567.

The other alleged errors of the Circuit Court of Appeals claimed by the petitioner on page 7 are practically restatements of its first alleged error.

But, the petitioner never asserted a lien against the alcohol. It was party to a sale of the alcohol free of any lien. The proceeds of the sale represents a fund, no part of which are tax proceeds.

Contrast *Heyman* v. *United States,* 285 Fed. 685 relied upon by the petitioner, where the court states at page 686:

"The Referee found, and this finding was also confirmed by the Judge, that the Trustees added to the price the sum of $2.10 per gallon, being the

amount of the tax, and that they thus collected the tax, not eo nomine, but in effect. This the Trustees dispute. But the finding of the Referee, who heard the conflicting testimony of the witnesses, was supported by substantial evidence and the record here presented does not suffice to overcome the presumption of correctness which attaches to such a finding confirmed by the District Judge."

Page 688:

"* * * For the declared purpose of obtaining this advantage they did, under an erroneous ex parte order of the Referee, *made on their application and to which the United States was not a party,* sell the liquor as and for tax free and the purchasers bought it as such.

The latter paid for it, in addition to the price they would have paid had the sale been properly made, an amount equal to the tax. This the Trustees in bankruptcy received, and the fund is now in court for distribution to whomsoever it justly belongs."

The Court held at page 688:

"In good conscience the court could not make the purchasers pay the tax again, nor can it permit the Trustees to retain the fund accumulated under an erroneous order of sale contrary to the rights of the Government, *which was then no party to the proceeding.* Further, in conscience, the Government is entitled to this fund. It does in effect, represent the tax."

Of course, in the case at bar, the Government is a party to the stipulation ordering the sale free of any claim of any character whatsoever and the proceeds does not, in effect, represent the tax. Indeed, the alleged tax itself is more than double the amount of the proceeds in the Registry of the court, and if the Government were permitted to succeed, the claimant would be deprived of the just fruits of the decree in his favor.

At page 12 of Government's Brief, we find the following amazing mis-statement:

> "The only effect of the order of confirmation of sale was that the court determined that the price bid was the best price obtainable for the same; and when the court directed that the alcohol be delivered to the purchaser free and clear of all government taxes and tax liens, it clearly indicated the fact that no taxes had been paid, and by directing the proceeds of sale to be deposited in its registry created a fund out of which the taxes, so far as possible, should be paid."

The conclusion to be drawn from the sale of the alcohol, tax free, as a result of the stipulation of counsel, is either that the taxes had been paid, or that no tax would be claimed. The entry of the order of June 4, 1935, complained of by the petitioner, is conclusive proof that there is no basis for the presumptions indulged in by the petitioner with respect to the court's intentions and determinations by the order of confirmation. Furthermore, there was no necessity for any determination with respect specifically to any taxes on the alcohol. There was no claim for tax, and the Government consented that the alcohol be sold free of any claim.

There being no claim for a tax on the alcohol, how can the Government, which was a party to the proceeding and a stipulator, make claim against the proceeds which cannot even satisfy one-half of the lien alleged and which would deny to the claimant his full interest in the proceeds, no part of which represents tax. The sale of the alcohol free of any claim of taxes makes unconscionable this belated claim to the proceeds of the sale and would work a grave injustice to the successful claimant who would be deprived of the value of the *res*.

Much is made of the fact that the Government did not assert its claim for tax because it did not know who the owner of the alcohol was and because it denied that Rizzo

was the owner thereof. This contention is fatuous. It is unnecessary to know who the owner of alcohol may be to assert a tax lien upon the *res*.

As correctly stated by the Government in its petition, page 13:

> "That the United States has a lien on *Distilled spirits* for the amount of the tax due thereon until paid, has been held by this court."
>
> *Thompson* v. *U. S.*, 142 U. S. 471;
> *United States* v. *One Ford Coupe*, 272 U. S. 321;
> *United States* v. *Ulrici*, 111 U. S. 38.

And as stated by the petitioner in its petition, page 13:

> "By section 3251 of the Revised Statutes (U. S. C., title 26, Sec. 249) the tax is declared to be a first lien *on the spirits* until the tax is paid."

To give color to the belated claim of the petitioner for an alleged tax, petitioner states at page 8:

> "But if in the forfeiture proceedings it should be finally determined that the claimant was the owner of the alcohol, then the liability of claimant for payment of tax on the alcohol would thereupon arise."

The Government, however, is seeking to assert a lien on the proceeds of the sale, the theory being that the alcohol was subject to tax. The reason advanced for this about face upon the part of the petitioner is untenable. Plainly, the petitioner agreed that the alcohol was not subject to a tax. That the Government wanted all or nothing by the assertion of its forfeiture claim. Having failed in this, it attempts to break up into component parts the claim for the whole and litigate anew a claim for the part.

In the previous petition, which was denied, the Government at page 2 sought to present the following question:

> "Whether a court has authority to order the sale (as perishable) of a cargo of alcohol intended

for beverage purposes, free and clear of all revenue taxes, *when such taxes have not been paid, and,* in confirming the sale, to order that the alcohol shall be treated by the Government as tax-paid, and to direct the United States Marshal to place appropriate notices to that effect upon the containers."

The Government, in the said petition (page 4), contended that the court erred:

"1. In ordering the alcohol herein sold free and clear of all claims of every character, including internal revenue taxes.

2. In entering an order confirming the sale of the alcohol tax-free and directing:

(a) That it should be delivered to the purchaser and considered by all the branches of the Government as tax-paid.

(b) That the Marshal should place upon the containers a notice indicating its tax-paid condition in place of the stamps required by the internal revenue laws."

The said petition further sets forth (page 5):

"The orders complained of were entered by the Circuit Court of Appeals subsequent to the final decree in this cause. They amount to an execution of one of the alternative provisions of that decree and are final *in that nothing remains to be done except the ministerial act of delivering the proceeds of sale to the claimant.*

Cf. Forgay v. *Conrad,* 6 How. 201;
Bronson v. *Railroad Company,* 2 Black 524;
Winthrop Iron Co. v. *Meeker,* 109 U. S. 180."

From the foregoing, it is apparent that the Government then took the position that a denial of the previous petition would leave nothing to be done except the ministerial act of delivering the proceeds of the sale to the claimant.

The petitioner complained of the court's order of sale in its previous petition, which was denied. It was pointed out by the petitioner, which procured a stay of the confirmation of sale pending the determination of its petition, that if the sale were confirmed upon the terms of the order of the Circuit Court of Appeals, that the Government would lose its right to assert any claim for taxes. The order of confirmation was entered, as the petition was denied and the stay dissolved. Now, the petitioner takes the position that the claim for taxes is made at this belated hour because the position was taken that Rizzo was not the owner. No lien having been asserted upon the cargo, none can attach to the proceeds. No claim having been made for taxes in the libel suit, none can be made now. In the face of the agreement of the petitioner that no claim of any kind whatsoever exists against the cargo other than those asserted in the libel, it makes it unconscionable for the petitioner to attempt to render nugatory the final decree of the Circuit Court of Appeals by attempting to take the complete subject matter awarded to the claimant away from him, and divert it to the Government on a pure assumption that they constitute taxes, which is contrary to the fact as disclosed by the record, contrary to the law as held by the Circuit Court of Appeals and by this court, and is in plain defiance of the Government's own stand.

Wherefore, it is respectfully prayed that the petition for the writ of certiorari be denied.

Respectfully submitted,

MINTURN & WEINBERGER,
Attorneys for Claimant-Respondent.

Louis Halle,
Milton Kroopf,
Samuel I. Kessler,
Of Counsel.

FILE COPY

Supreme Court, U.S.
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CLERK

No. 272

IN THE

Supreme Court of the United States

OCTOBER TERM, 1935

UNITED STATES OF AMERICA, PETITIONER

v.

FRANK RIZZO, CLAIMANT OF 146,157 GALLONS OF ALCOHOL

ON MOTION TO DISMISS UNDER RULE 7, SUBDIVISION 3 OF THE GENERAL RULES OF THE SUPREME COURT OF THE UNITED STATES.

NOTICE OF MOTION, AFFIDAVIT, AND BRIEF FOR RESPONDENT IN SUPPORT OF MOTION.

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IN THE

Supreme Court of the United States

No. 272, October Term 1935.

UNITED STATES OF AMERICA, *Petitioner,* *vs.* FRANK RIZZO, Claimant of 146,157 Gallons of Alcohol.	*Notice of Motion to Dismiss Under Rule 7, Subdivision 3 of the General Rules of the Supreme Court of the United States.*

NOTICE OF MOTION.

To: Hon. Stanley Reed, Solicitor General of the United States of America, Attorney for Petitioner.

SIR:

PLEASE TAKE NOTICE that on January 8, 1935, the undersigned will move this Honorable Court, at a Term thereof to be held at the Supreme Court, in the United States Supreme Court Building, First Street N. E., Washington, D. C., for an order dismissing the writ of certiorari granted in the above-entitled cause, upon the ground that the United States Supreme Court lacks jurisdiction to pass upon the merits of the writ of certiorari, for the reasons asserted in the affidavit hereto annexed, as well as the accompanying brief, under Rule 7, sub-division 3 of the General Rules of the United States Supreme Court.

Dated, Newark, N. J., January 7th, 1936.

MINTURN & WEINBERGER,
Solicitors for Respondent,
60 Park Place, Newark, New Jersey.

IN THE

SUPREME COURT OF THE UNITED STATES.

No. 272, October Term 1935.

UNITED STATES OF AMERICA, *Petitioner,* *vs.* FRANK RIZZO, Claimant of 146,157 Gallons of Alcohol.	*On Motion to Dismiss.* *Affidavit.*

AFFIDAVIT.

STATE OF NEW JERSEY, }
COUNTY OF ESSEX. } ss.:

HARRY H. WEINBERGER, being duly sworn, deposes and says:

I am a member of the firm of Minturn & Weinberger, attorneys of record for the respondent in the above-entitled cause.

Since the petition for the writ of certiorari to this court was granted by this court, certain grounds which were not urged in opposition to the petition, and which attack the jurisdiction of this court have occurred to your deponent, which your deponent seeks to bring to the attention of this court for the purpose of urging a dismissal of this cause for lack of jurisdiction.

This application is made under Rule 7, sub-division 3, of the General Rules of this court.

The following grounds, none of which have been advanced or presented in the brief in opposition to the brief of the petitioner for this writ, are respectfully urged in

support of this motion for a dismissal of this cause for the want of jurisdiction.

1. The order of June 4, 1935 (R. 325-6), complained of by the petitioner, is no adjudication of any of the rights of the petitioner, but adjudicates, if at all, the right of the Collector of Internal Revenue to intervene, and, as such, he is the only aggrieved party entitled to appear and prosecute.

2. The order of June 4, 1935 is purely an administrative order, concerning as it does merely the carrying out of the final decree of October 2, 1934 (R. 290-1), which had been entered eight months prior and which final decree was in no respect altered, modified or amended.

3. The petitioner contends that this cause is a pure admiralty cause, and, as such, the claim for the alleged tax could not properly be urged under the libel proceedings herein, and for that reason attempts to justify the failure to urge it in the cause. Nevertheless, the petitioner claims that the court, in entering the order of June 4, 1935 in this very admiralty cause, committed error by reason of depriving the government of its claim for the alleged tax. This is an anomalous contention.

4. The final decree in this cause was entered on October 2, 1934, and no appeal was ever taken from the said final decree by petition for writ or otherwise, and the said final decree has been conceded by the petitioner to be a valid and correct judgment in this cause. (See Government's Brief in No. 621, October Term 1934, at p. 7.) The time within which to appeal therefrom has long since expired. The order of June 4, 1935 did not adjudicate any substantive rights and was not a judicial determination upon which an appeal can be properly predicated.

5. There is no jurisdiction vested in the United States Circuit Court of Appeals, of an original nature, over a

tax claim such as was attempted to be asserted by the Collector in this cause.

For the aforesaid reasons, it is respectfully urged that this motion to dismiss be granted.

HARRY H. WEINBERGER.

Subscribed and sworn to before me this 7th day of January, 1936.

WILLIAM N. MARGOLIS,
An Attorney at Law
of the State of New Jersey.

IN THE

SUPREME COURT OF THE UNITED STATES.

No. 272, October Term 1935.

UNITED STATES OF AMERICA, *Petitioner,* *vs.* FRANK RIZZO, Claimant of 146,157 Gallons of Alcohol.	*On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.*

BRIEF FOR RESPONDENT IN SUPPORT OF MOTION TO DISMISS UNDER RULE 7, SUBDIVISION 3, OF THE GENERAL RULES OF THE SUPREME COURT OF THE UNITED STATES.

POINT I.

The order of June 4, 1935 is not an adjudication of any of the rights of the petitioner, but adjudicates, if at all, the right of the Collector of Internal Revenue to intervene and, as such, he is the only aggrieved party entitled to appear and prosecute.

The only party aggrieved, if at all, is the Collector of Internal Revenue, who is not the petitioner.

> "An appeal cannot be taken from a decree by one who is not a party to the suit."
>
> (*Indiana Southern R. Co.* v. *Liverpool, L. & G. Insurance Co.*, 109 U. S. 168; 27 L. Ed. 895.)

> "No one but a party appearing in the lower Court can appeal from a decree."
>
> *William Bagley* v. *United States*, 5 Wall, 377; 18 L. Ed. 583.

"A judgment to be appealable must be final as to all of the parties and as to the whole subject matter and as to all the causes of action involved."

Collins v. *Miller*, 252 U. S. 364, 64 L. Ed. 616.

Louisiana Nav. Co. v. *Oyster Com.*, 226 U. S. 99, 101; 57 L. Ed. 138, 140.

POINT II.

This Court is without jurisdiction and should dismiss the writ of certiorari which was granted on October 14, 1935.

The order of June 4, 1935, complained of by the petitioner, United States of America, was purely an administrative order, concerning as it did merely the carrying out of the order of October 2, 1934 (R. 290-291), according to its true intent and purpose.

The case of *Wynkoop, Hallenbeck, Crawford Co.* v. *Thomas J. Gaines, Jr.*, 227 U. S. 4, 57 L. Ed. 391, is on "all fours" with our case, inasmuch as it was there held that a final order entered on June 22, 1911, from which no appeal was taken or petition to review filed, could not be attacked because an order was thereafter entered on August 3, 1911, for the only questions that remained and which were disposed of by the latter order were purely administrative, concerning as they did merely the carrying out of the order of June 22, 1911, according to its true intent and purpose.

The Court, by Chief Justice White, said:

"That the motion to dismiss must be granted is manifest from the statement we have made. Whatever may have been the nature of the original controversy presented by the intervention of the Wynkoop Company, the acquiesence of both parties in the order of June 22, 1911, settled that controversy, and the questions remaining were purely

administrative, concerning as they did merely the carrying out of the order according to its true intent and purpose."

POINT III.

The petitioner contends that this cause is a pure admiralty cause and, if that be so, the claim for the alleged tax could not properly be urged under the libel proceedings herein.

The attempt to urge, as the petitioner does in this admiralty cause, a claim which the petitioner admits could not be urged, because of the contention made by the petitioner that this is an admiralty cause, can scarcely be the basis for complaining of the order of June 4, 1935, which refuses to recognize the claim made by the petitioner in this admiralty cause.

See *"The Lottawanna,"* 20 Wall. 201, where the Court states:

> "Beyond doubt maritime liens upon the property sold by the order of the admiralty court follow the proceeds, but the proceeds arising from such a sale, if the title of the owner is unincumbered *and not subject to any maritime lien of any kind,* belong to the owner, as the admiralty courts are not courts of bankruptcy or of insolvency, nor are they vested with any jurisdiction to distribute such property of the owner, any more than any other property belonging to him, among his creditors. Such proceeds, if unaffected by any lien, when all legal claims upon the fund are discharged, become by operation of law the absolute property of the owner." (Italics ours.) "Brown *v.* Lull, 2 Sumn. 443; Sheppard *v.* Taylor, 5 Pet. 675; The Europa, Bro. & Lush., pp. 87, 91; The Amelie, 2 Cliff. 448, 6 Wall. 30, 18 L. ed. 809."

POINT IV.

There is no ORIGINAL jurisdiction vested in the United States Circuit Court of Appeals of a tax claim such as was attempted to be asserted in this cause.

Under the Judicial Code, Title 28, Sec. 41, subdv. 5, the Districts Courts of the United States are vested with original jurisdiction over causes arising under internal revenues, customs and tonnage laws.

The only other court that has certain original jurisdiction over such matters is the Court of Customs Appeals.

The Circuit Court of Appeals has no original jurisdiction. Its jurisdiction is appellate, as limited and established by the act.

> *Whitney* v. *Dick,* 202 U. S. 132, 50 L. Ed. 963;
> *Kentucky* v. *Powers,* 201 U. S. 1, 35; 50 L. Ed. 633, 649.

In *United States* v. *Mayer,* 235 U. S. 55, 65; 59 L. Ed. 129, 134, Chief Justice Hughes states:

> "But the jurisdiction of the circuit courts of appeals is exclusively appellate (act of March 3, 1891, secs. 2, 6 (26 Stat. at L. 826, 828, chap. 517, U. S. Comp. Stat. 1901, pp. 547, 549), Judicial Code, secs. 117, 128; Whitney *v.* Dick, 202 U. S. 132, 137, 138, 50 L. ed. 963, 965, 26 Sup. Ct. Rep. 584); and their authority to issue writs is only that which may properly be deemed to be auxiliary to their appellate power."

The application by the Collector of Internal Revenue was, in its nature, nothing more than a petition to intervene, the refusal by the Court being purely discretionary and, as such, not appealable.

> *Credits Commutation Co.* v. *United States,* 177 U. S. 311; 44 L. Ed. 782.

It is not amiss to point out the holding of this Court in *Martinez* v. *International Banking Corporation*, 220 U. S. 214, 55 L. Ed. 438, 443, where the Court states:

> "But the foundation upon which rests the doctrine which, as a general rule, limits the appellate jurisdiction of this Court to final judgments, is that cases should not be brought here by piecemeal through the medium of successive appeals.
>
> "The motion to dismiss the appeals in each of the cases is granted. Dismissed for want of jurisdiction."

For the afore-stated reasons, it is respectfully urged that the motion to dismiss this writ of certiorari be granted.

Respectfully submitted,

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No. 272

IN THE

Supreme Court of the United States

OCTOBER TERM, 1935

UNITED STATES OF AMERICA, PETITIONER

v.

FRANK RIZZO, CLAIMANT OF 146,157 GALLONS OF ALCOHOL

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENT.

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Statement.

On December 22, 1932, and December 30, 1932, respectively, a libel (R. 2-4) and an amendment thereto (R. 12) were filed (the latter not having been allowed) (R. 12) in the United States District Court for the District of New Jersey against the vessel's cargo of alcohol.

The libel and the amendment thereto prayed for a forfeiture of the alcohol on the following grounds:

1. That it was not included or described in the vessel's manifest, and hence was subject to forfeiture in accordance with Section 584 of the Tariff Act of 1930.

2. That it contained more than one-half of one per cent. of alcohol and had been imported into the United States without proper permit, and therefore, was subject to forfeiture under the provisions of Par. 814 of the Tariff Act of 1930.

3. That there was unladen, trans-shipped to, placed in, and received in the said vessel 146,157 gallons of alcohol

of the value of $781,939.95, in violation of the provisions of Sec. 584 of Par. 814 of the Tariff Act of 1930, and that therefore, the Master of said vessel became liable to the penalty equal to twice the value of the said merchandise, to wit: $1,563,879.90, and the said merchandise became subject to forfeiture in accordance with Section 594 of the Tariff Act of 1930.

4. That the vessel was employed in a trade other than what for which she was licensed, to wit: The trade of transporting intoxicating liquor, which was an "illicit trade," and hence the cargo was subject to forfeiture under R. S. Sec. 4377.

To this libel the claimant filed an answer (R. 6, R. 11) putting in issue all of the material allegations of the libellant's causes, and among others, the specific issue referred to by the petitioner, to wit: Whether the alcohol was imported illegally.

The District Court declared the alcohol forfeit on the fourth cause set out in the libel; that is, because the cargo was carried on a vessel employed in a trade other than that for which she was licensed (R. S. Sec. 4377) (R. 29-30).

On October 2, 1934, the Circuit Court of Appeals for the Third Circuit reversed the decree of forfeiture (R. 289-290) and the final decree was entered the same day (R. 290-291).

The United States filed a petition for rehearing, which was denied December 5, 1934 (R. 301).

On November 22, 1934, the Circuit Court of Appeals ordered the alcohol sold, and further ordered that the proceeds of sale should be deposited in the Registry of that Court, and "be substituted in the place and stead of the said 146,157 gallons of alcohol, and that all further

proceedings *herein* shall be against said proceeds of sale" (R. 297-299).

(Note: In the statement contained in the petitioner's brief at Page 4, the word *"herein"* does not appear in the quoted portion of the Circuit Court's order. The reason we point this out is that the word *"herein"* is vital in that it limits the libellant to the causes specified in its libel.)

On September 13, 1934 (R. 287) there was an answer filed to the petition of Frank Rizzo, in which the United States alleged in Paragraph 5 thereof (R. 289):

> "It is further alleged that the said alcohol was properly condemned as forfeited for violation of the provisions of R. S., sec. 4377 (title 46, sec. 325, U. S. C.), because the said vessel was being used in a trade in fraud of the revenue of the United States, and that an allegation in the libel to the effect that said vessel was transporting alcohol in violation of the National Prohibition Act was in legal effect an allegation that the said alcohol was being carried without payment of tax due the United States of America, and that said alcohol was properly the subject of forfeiture."

On December 4, 1934, an order was made fixing the terms of sale of the cargo of alcohol, "as representing the terms of sale agreed upon" (R. 300). It was agreed by and between the parties that the said alcohol should be sold "free and clear of all claims of any kind or character" (R. 299-301).

On December 8, 1934, the United States Marshal for the District of New Jersey offered the said alcohol at public auction, and the highest bid therefor was $1.85 per wine gallon (R. 301-302).

On December 11, 1934, the lower Court confirmed the sale and ordered that the alcohol be delivered to the purchaser "free and clear of any and all claims of any kind or character; free of all government taxes or tax liens

of any kind or character; free of all custom duties; and that the said alcohol or spirits intended for beverage purposes shall be treated by the United States Government and any of its departments as tax paid, * * *" (R. 302-304).

An exception was taken only to the jurisdiction of the Circuit Court of Appeals to make the order (R. 304).

A petition for a writ of certiorari, questioning the authority of the United States Circuit Court of Appeals to include these provisions as to taxes in its order of confirmation, was denied by this Court on January 21, 1935. (U. S. *v.* Frank Rizzo, claimant of 146,157 gallons of alcohol, October Term 1934, No. 621, 294 U. S. 709.)

On January 24, 1935, there was filed in the office of the Clerk of the Circuit Court of Appeals for the Third Circuit assignments of approximately $221,000 of said proceeds by the claimant Rizzo (R. 304-306).

On February 2, 1935, the United States filed in the Circuit Court of Appeals a petition asking that the Court direct that the proceeds of the sale be paid over to the Treasurer of the United States in satisfaction of an alleged lien for alleged taxes due on said alcohol (R. 307-311).

The Collector of Internal Revenue, one Charles V. Duffy, averred that he had not issued stamps for the said drums of alcohol, nor had he received the money for the stamps nor had any part of the tax due on the said alcohol been paid in his district (R. 310-311).

On April 22, 1935, a notice of levy for the alleged tax was addressed to and filed with the Clerk of the said Circuit Court of Appeals by the Collector of Internal Revenue for the First Collection District of New Jersey, together with warrant for distraint, two copies of tax liens under

Internal Revenue laws, and a copy of notice of demand for tax (R. 312-320).

On the same date similar notices and demands were addressed to and filed with said Clerk by the Collector of Internal Revenue for the First Collection District of Pennsylvania (R. 320-324).

On June 4, 1935, the Court below entered the order complained of, directing "that said fund be paid over by the Clerk of this Court to the Claimant, Rizzo, or his assigns, in accordance with the decree heretofore entered on October 2, 1934" (R. 325-326).

This Court granted the government's petition for a writ of certiorari on October 14, 1935 (R. 330).

POINT I.

The libellant consented to the sale of the alcohol free and clear of any taxes.

The order of June 4, 1935, was a purely administrative order, concerning as it did merely the carrying out of the order of October 2, 1934, according to its true intent and purpose (*Wynkoop, Hallenback, Crawford Co.* v. *Thomas J. Gaines, Jr.*, 227 U. S. 4, 57 L. Ed. 391).

The Court below did not err in holding, as contended by the petitioner, in effect, by its order of June 4, 1935, that the United States had waived its right to assert a claim for taxes on the alcohol. (See Government's brief, p. 8 under "Specification of Errors to be Urged," subdiv. 1.)

The fact is that full opportunity had been given to the libellant to do so. It never offered any evidence of the failure to pay any tax, import duty or otherwise. That it never was the intention to assert such claim, after the cause had terminated, appears specifically by the quoted

portion of the claim made by the attorney for the libellant in the answer to the claim, wherein it is alleged by the United States Attorney, under paragraph 5 (R. 289) that the alcohol was properly subject to forfeiture because the vessel was "being used in a trade in fraud of the revenue of the United States" and that "the said alcohol was being carried without payment of tax due the United States of America."

Furthermore, the United States specifically consented to the sale of the alcohol free and clear of any taxes at a time when there was doubt, as to whether in fact a tax was assessable on alcohol during the efficacy of the Eighteenth Amendment.

POINT II.

There is no proof that the alcohol was manufactured in the United States and that a lien accrued thereon.

The government's position in this writ is based on an assumed condition, which is unsupported by the record and which infects each of the errors urged by the government (Government's brief, p. 8) with a vice that cannot be erased, to wit: The assumption, wholly unsupported by the record, that the alcohol in suit was of domestic manufacture, so that a lien could attach, if at all. (See R. S., Sec. 3251.) In any event, any alleged lien was lost, if one existed, and could not be transferred, as such, against the proceeds of sale, because it would in effect be inequitable in the face of the deprival to the claimant of his entire interest in the subject matter. (*Cf. Beal* v. *White,* 74 U. S. 382; *United States* v. *Turner,* Fed. Cas. 16584; *Alkan* v. *Bean,* Fed. Cas. 202.). (Government's brief, p. 35; R. S. 3186; R. 315.)

The libellant alleged, as appears in the second cause of forfeiture, that the alcohol had been imported into the United States without proper permit for same having

been issued, relying on Par. 814 of the Tariff Act of 1930, and the libellant also relied on Sec. 594 of the Tariff Act of 1930, as well as Sec. 584 of the Tariff Act (R. 2-3).

Issue was taken with respect to all the material allegations of the libel (R. 11), the claimant putting in issue the claim of an illegal importation by denying that the alcohol was imported into the United States.

No evidence whatsoever appears in the record with respect to the place of manufacture of the said alcohol, and the specious reasoning of the government in its brief in an effort to create an alleged lien falls short of any reference to the record which, in any way, indicates the place of manufacture of the alcohol. On the contrary, the government's pleading alleges that the alcohol was imported.

The syllogistic reasoning contained in the footnote on page 12 of the Government's brief is based on this fallacious premise.

Without proof that the alcohol was manufactured in the United States no lien can attach, and hence, on the record in this cause, the judgment should be affirmed.

There is no dispute concerning the nature of the tax necessary for the government to succeed in this cause, the government assuming the burden throughout its brief of establishing the fact of domestic production in order to create a lien.

On the other hand there is no evidence whatsoever, either conclusive or even presumptive, of domestic manufacture. The government took the position and libeled the alcohol in question under the definite contention and allegation that the same "had been imported into the United States without proper permit" (R. 3, allegation 9 of the libel under the second cause of forfeiture).

POINT III.

The final decree entered October 2, 1934 was admittedly correct and adjudicated all of the rights of the parties in the within cause.

The order of June 4, 1935 was properly made and entered inasmuch as the final decree of October 2, 1934, adjudicated all of the rights which the respective parties to this proceeding had in the *res*, and no appeal from that decree had been taken, it having been conceded to be a correct determination of the cause. (See Government's brief, p. 7, in No. 621, October Term, 1934.)

In seeking title to the *res* by the claim of forfeiture, each and every right is deemed to have been adjudicated by the final decree. (*Tait* v. *Western Maryland R. Co.*, 289 U. S. 620; *Southern Pacific R. Co.* v. *U. S.*, 168 U. S. 1, 49; *U. S.* v. *Moser*, 266 U. S. 236.)

Res adjudicata is applicable in tax litigations.

(*New Orleans* v. *Citizens Bank of Louisville*, 167 U. S. 371.)

The language in *Baltimore Steamship Co.* v. *Phillips*, 274 U. S. 316, 321, accurately describes the present situation:

> "*A cause of action does not consist of facts, but of the unlawful violation of a right which the facts show.* The number and variety of the facts alleged do not establish more than one cause of action so long as their result, whether they be considered severally or in combination, is the violation of but one right by a single legal wrong. The mere multiplication of grounds of negligence alleged as causing the same injury does not result in multiplying the causes of action. 'The facts are merely the means, and not the end. They do not constitute the cause of action, but they show its existence by making the wrong appear. The *thing*, therefore, which in contemplation of law as its *cause*, becomes a ground for action, is not the group of

facts alleged in the declaration, bill, or indictment, *but the result of these in a legal wrong, the existence of which, if true,* they conclusively evince.'" "Chobanian *v.* Washburn Wire Co., 33 R. I. 289, 302, 80 Atl. 394, Ann. Cas. 1913D, 730." (Italics ours.)

United States v. *Moser, supra,* p. 242, states:

"But a *fact, question,* or right distinctly adjudged in the original action cannot be disputed in a subsequent action, even though the determination was reached upon an erroneous view or by an erroneous application of the law." (Italics ours.)

American Express Co. v. *Mullins,* 212 U. S. 311;

Reed v. *Allen,* 286 U. S. 191;

Vinson v. *Graham,* 44 F. (2) 772.

This Court in *Various Items* v. *United States,* 282 U. S. 577, at page 579 stated:

"Included in the $6.40 is the basic tax of $2.20, which is not a penalty but a true tax. Only the remaining part of the $6.40 may be regarded as a penalty, but whether the exaction be a tax or a penalty, or partly one and partly the other, there is no constitutional objection to enforcing it by forfeiture of the offending property. See United States *v.* One Ford Coupe, 272 U. S. 321, 328-329."

In *Gelston* vs. *Hoyt,* 3 Wheat. 246, 320, we have a clear statement of the doctrine which excludes the possibility of litigating the point of the tax now urged by the government in its brief. The Court states:

"Upon principle, therefore, we are of opinion that the sentence of acquittal in this case, with a denial of a certificate of a reasonable cause of seizure, was conclusive evidence that no forfeiture was incurred, and that the seizure was tortious; and that these questions cannot again be litigated in any other forum. And if the point had never been decided, we should, from its reasonableness and known analogy to other proceedings, have had entire confidence in the correctness of the doctrine. But there are authorities directly in point which have never been overruled, nor, as far as we know,

> ever been brought judicially into doubt. Above a century ago it was decided by Mr. Baron Price (12 Vin. Abrid. A. B. 22, p. 95) that an acquittal in the exchequer was conclusive evidence of the illegality of the seizure, and he refused in that case (which was trover for the goods seized) to let the parties in to contest the fact over again. . . . If to these decisions we add the pointed language of Lord Chief Justice DeGrey, in the Dutchess of Kingston's Case, 11 State, Trials, 218, etc., 'That the rule of evidence must be, as it is often declared to be, reciprocal,' etc."

So, too, all claims of any interested party in the *res* should have been asserted in the cause after the monition issued and the world was put upon notice that the court held custody of the alcohol, subject to any claim of any interested party therein.

In *Rounds* v. *Cloverport Foundry and Machine Co.*, 237 U. S. 303, 306, Chief Justice Hughes, speaking for this Court, said:

> "The proceeding in rem which is within the exclusive jurisdiction of admiralty is one essentially against the vessel itself as the debtor or offending thing,—in which the vessel is itself 'seized and impleaded as the defendant, and is judged and sentenced accordingly.' By virtue of dominion over the thing all persons interested in it are deemed to be parties to the suit; the decree binds all the world, and under it the property passes, and not merely the title or interest of a personal defendant."

POINT IV.

It was stipulated, and an order entered on the said stipulation, that the fund realized on the sale of the alcohol was to answer only the causes of forfeiture alleged and set forth in the libel.

As heretofore pointed out, it was expressly stipulated (R. 300), and the order so declared, that the fund realized upon the sale of the alcohol was to answer the purposes of the suit under the causes enumerated in the libel as it then stood, for by the Court's order of November 22, 1934, it was adjudged and decreed that the proceeds of sale "be substituted in the place and stead of said 146,157 gallons of alcohol, and that all further proceedings *herein* shall be against said proceeds of sale." The word "herein" has the significance of referring to the causes pending in the libel under which the seizure was sought to be justified and under issues which had already been drawn by the pleadings.

The stipulation is binding on the government and it cannot now complain. (*Swift & Co.* v. *Hocking Valley R. Co.*, 243 U. S. 281.

The statement appearing in the government's brief at page 23 (reading as follows) is unsupported by the record:

> "Having read the court's order of November 22, 1934, as preserving all liens against the proceeds, the United States Attorney felt that he was on safe ground so far as taxes were concerned. With this justifiable optimism, he reached the crucial agreement as to the 'terms of sale.' This is the agreement which is recited in the order of December 4, 1934, and the only evidence upon which the respondent bases his contention that the Government has waived all its rights to taxes."

Numerous reasons suggest themselves as to why this statement lacks conviction.

It has already been shown that prior to the reversal of the decree of the District Court forfeiting the alcohol, the United States Attorney attempted to justify the forfeiture under the libel because "the said alcohol was being carried without payment of tax due the United States of America" (R. 289). And, too, the failure of the government to object to the order of confirmation, on the ground that the amount realized would be insufficient to pay the full claim of their tax is another indication that the government had waived its claim for tax lien, else it should have seen fit and should have been vigilant to object to the amount realized upon the sale, because of the deprivation to the government of its complete share in the tax, even if the whole fund were turned over to it.

POINT V.

The claim in the within cause is for a penalty and, as such, fell with the repeal of the Eighteenth Amendment.

The alleged tax sought to be recovered in this action is, in truth, a penalty imposed by Congress for violation of the National Prohibition Act. It was sought to forfeit the property by reason of the violation of the National Prohibition Act, and it was by virtue of the repeal of that Act that the decree of the District Court was reversed.

As stated in *United States* v. *Glidden Co.*, 78 F. (2d) 639:

> "We start with the general principle announced in Lipke *v.* Lederer, 259 U. S. 557, 42 S. Ct. 549, 551, 66 L. Ed. 1061: 'The mere use of the word "tax" * * * is not enough to show that within the true intendment of the term a tax was laid,' for 'when by its very nature the imposition is a penalty, it must be so regarded'; or with the definition of a tax in United States *v.* LaFranca, 282 U. S. 568, 51 S. Ct. 278, 280, 75 L. Ed. 551, 'A "tax" is an en-

> forced contribution to provide for the support of government; a "penalty," as the word is here used, is an exaction imposed by statute as punishment for an unlawful act. The two words are not interchangeable one for the other. No mere exercise of the art of lexicography can alter the essential nature of an act or a thing; and if an exaction be clearly a penalty it cannot be converted into a tax by the simple expedient of calling it such.' The basic tax laid by section 900 of the 1926 Revenue Law was imposed upon all distilled spirits produced or imported into the United States, to be paid by the distiller or importer when withdrawn. Subdivision 4 of that section imposed an additional exaction on such distilled spirits as are 'diverted to beverage purposes' to be paid, not by the distiller or importer, but by 'the person responsible for such diversion,' with a credit for the basic tax if previously paid. *Since the defendants were neither distillers nor importers, and have paid no basic tax, the exaction here sought to be recovered is either wholly a penalty or wholly a tax, and is not partly penalty and partly tax.*" (Italics ours.)

The repeal of the Eighteenth Amendment to the Constitution by the ratification of the Twenty-First Amendment thereof, deprived the Court of jurisdiction to entertain any proceedings in this action with respect to the enforcement of the alleged tax, which was commenced after the date of such repeal.

The ratification of the Twenty-First Amendment of the Constitution, which repealed the Eighteenth Amendment was consummated on December 5, 1933.

United States v. *Chambers & Gibson,* 291 U. S. 217.

It has been held by the United States Supreme Court in *United States* v. *Chambers & Gibson, supra,* that the Federal courts since the repeal of the Eighteenth Amendment are deprived of jurisdiction to entertain proceedings under indictments in criminal action charging violation of such parts of the National Prohibition Act as

rests upon the grant of authority to the Congress by the Eighteenth Amendment and that this consequence is not altered by the fact that the crimes sought to be punished were committed while the National Prohibition Act was in effect.

To the same effect see:

Smallwood v. *United States* (C. C. A. 5), 68 Fed. (2d), 244;

Green v. *United States* (C. C. A. 9), 67 Fed (2d) 846;

United States v. *Oliver,* 5 Fed. Supp. 500;

United States v. *Matoil Service & Transport Co.,* 72 F. (2d) 772.

The ruling in the *Chambers* case applies as well to actions to recover penalties like the present case.

The *Chambers* case cites with approval *Yeaton* v. *The General Pinkney,* 5 Cranch. 281, where the statute under which a ship had been condemned in admiralty had expired while the case was pending on appeal. This Court held that the cause was to be considered as if no sentence had been pronounced. Chief Justice Marshall said in that case:

> 'It has long been settled, on general principles, that after the expiration or repeal of a law, no penalty can be enforced, nor punishment inflicted, for violations of the law committed while it was in force, unless some special provision be made for that purpose by statute."

The Supreme Court in the *Chambers* case also relied upon *Maryland* v. *Baltimore & Ohio R. R. Co.,* 3 How. 534, where Chief Justice Taney said at page 552:

> "The repeal of the law imposing the penalty, is of itself a remission."

This Court, in *Gulf, Colorado & Sante Fe Railway Co.* v. *Dennis,* 224 U. S. 503 (cited by this Court in the *Chambers* case) reversed a judgment of the lower Court granting to the plaintiff a certain sum as an attorney's fee, in view of the fact that the statute under which the attorney's fee was awarded had been held unconstitutional by this Court since the judgment of the lower Court had been rendered. This Court stated at page 506:

> "These questions may not be directly answered by the prior decisions of this Court, but their right solution is more than suggested by the well-recognized rule of decision, that when, during the pendency in an appellate court of an action for a penalty, civil or criminal, the statute prescribing the penalty is repealed, without any saving clause, the appellate court must dispose of the case under the law in force when its decision is given, even although to do so requires the reversal of a judgment which was right when rendered."

The doctrine of the *Chambers* case, therefore, clearly applies to civil actions to recover penalties.

United States v. *Matoil Service & Transport Co., supra.*

The facts in this case, together with the position taken by the government, indicate that the claim is made for a penalty rather than a tax.

It was urged by the proctor for the libellant that the reason for his failure to assert any claim for taxes as against Rizzo was that he had not shown that he had a proper standing or status in the libel suit, and until such time as such status was established by Rizzo he would not make any claim for taxes against him.

The personal responsibility which attached to Rizzo and the claim as against him, of course, can only be re-

garded as a claim for a penalty against the diverter of the alcohol. This, to quote from the case of *United States* v. *Constantin*, No. 40, October Term 1935, decided December 9, 1935, is "significant of penal and prohibitory intent rather than the gathering of revenue." It was the conduct of the taxpayer, violative of the law, which was to determine whether to proceed against him or not.

Forfeiture was sought in the case at bar without success.

The final decree was not appealed from by the libellant. As heretofore pointed out, that judgment stands as *res adjudicata* with respect to all of the matters which might have been litigated concerning the subject matter herein.

POINT VI.

Collection of the tax must be effected in accordance with the statutes governing the same and the procedure attempted in the within cause is wholly alien to the said statutory requirements.

In the Revised Statutes there is specific provision made charging the Commissioner or Collector of Internal Revenue with the onus of collecting the tax, and the method and manner of collection and accounting is completely provided for by the Congress in the Statutes which constitute the machinery for the enforcement of the Internal Revenue Laws (Revenue Act of February 26, 1926).

Subdivision (a) of Sec. 600 of the Revenue Act of 1918, as amended, is amended to read as follows:

> "Sec. 600 (a) There shall be levied and collected on all distilled spirits now in bond or that have been or that may be hereafter produced in or imported into the United States, in lieu of the internal revenue taxes now imposed thereon by law, an internal-revenue tax at the following rates, to be paid by the distiller or importer when withdrawn

and collected under the provisions of existing law:" (Italics ours).

Congress has also made it the duty of the Collector of Internal Revenue "having knowledge of any wilful violation of any law of the United States relating to the revenue, within thirty days after coming into possession of such knowledge, to file with the District Attorney of the District in which any fine, penalty or forfeiture may be incurred, a statement of all the facts and circumstances of the case within his knowledge, together with the names of the witnesses, setting forth the provisions of the law believed to be so violated on which reliance may be had for condemnation or conviction" (Sec. 26, Title 26 U. S. C. A.).

And under Sec. 486 of Title 28, U. S. C. A. it is the duty of the United States Attorney for the District in which a claim is made by the Collector of Internal Revenue "to cause the proper proceedings to be commenced and prosecuted without delay, for fines, penalties and forfeitures in such case provided."

From the foregoing it clearly appears that the entire machinery for the institution of actions for the collection and enforcement and payment of revenue must be utilized by the Commissioner or Collector of Internal Revenue, the statutory designee, and the United States Attorney must institute such proceedings when called upon to do so on behalf of the Commissioner or Collector of Internal Revenue.

The machinery provided for by the Congress for the enforcement and the collection of taxes was entirely ignored in the case at bar. The statute requires the collection to be effected by the Commissioner or Collector of Internal Revenue.

The failure to comply with the statutory requirements is fatal, as the mode of enforcing the right to collect the

tax is specifically prescribed by statute and is the only method of enforcement.

Furthermore, in the case at bar there was no executive seizure by the Collector of Internal Revenue, but there was a seizure by the Collector of Customs (R. 2).

The libel proceedings through the monition gave notice to the entire world to appear therein and after the adjudication in the case at bar, it was too late for any party claiming an interest in the *res* to appear, intervene or make claim.

Rounds vs. *Cloverport Foundry and Machine Co.*, *supra.*

Finally, if the claim could not be made, as petitioner urges in this cause, since it was on the admiralty side, then the entry of the order of June 4, 1935 denying the libellant's attempted intervention is without error, and the libellant cannot complain by reason of the entry of the said order.

(*"The Lottawanna,"* 20 Wall. 201, 221.)

Wherefore, it is respectfully submitted that the order of the court below be affirmed.

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Solicitors for Respondent.

LOUIS HALLE,
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SAMUEL I. KESSLER,
Of Counsel.

SUPREME COURT OF THE UNITED STATES.

No. 272.—October Term, 1935.

United States, Petitioner, *vs.* Frank Rizzo, Claimant of 146,157 Gallons of Alcohol.	On Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

[March 9, 1936.]

Mr. Justice Brandeis delivered the opinion of the Court.

In December, 1932, a cargo of alcohol was seized by Customs and Coast Guard officials acting together; and the United States filed, in the federal court for New Jersey, a libel in admiralty praying forfeiture for violation of the customs and navigation laws. Rizzo, as claimant, filed an answer. A decree of forfeiture was entered on the ground that the cargo was carried on a vessel employed in a trade other than that for which she was licensed. The Court of Appeals reversed, citing *United States* v. *Chambers*, 291 U. S. 217. While the Government's petition for a rehearing, later denied, was pending, that court ordered, upon application by Rizzzo for sale of the alcohol, that it be sold, "free and clear of all claims of any kind or character"; that the proceeds be deposited in the registry; and that they "be substituted in the place and stead of said 146,157 gallons of alcohol, and that all further proceedings herein shall be against said proceeds of sale".

The marshal sold the alcohol for $1.85 per wine gallon. In confirming the sale, the court ordered (1) that the alcohol be delivered to the purchaser free of all government taxes or tax liens and customs duties; (2) that it "shall be treated by the United States Government and any of its departments as tax paid, irrespective of the lack of any stamp or tax certificate affixed thereto on the respective containers in which said alcohol may be deposited or contained"; and (3) that the proceeds of sale be paid into the registry of the court. We denied a writ of certiorari, sought on the ground that the Circuit Court of Appeals lacked authority to include the provision regarding taxes in its order of confirmation. 294 U. S. 709.

Thereupon, the United States filed in the Circuit Court of Appeals a petition asking that the proceeds of the sale be paid into the Treasury of the United States in satisfaction of the lien for

taxes due on the alcohol; made proof that the taxes exceeded the proceeds of the sale; and filed with the clerk notices of levy and warrant for distraint. The court ruled that the petition could not be entertained, because the Government had failed to raise the question of taxes when it filed its libel but had waited until after denial of certiorari to seek such relief. Accordingly, the Court directed that the proceeds be paid to the claimant or his assigns.[1] To review this order we granted certiorari, a misconstruction of the statutes concerning tax liens and a departure from the usual course of proceedings being charged. 296 U. S. —.

First. Rizzo does not attempt here to support the order on the ground stated by the Court of Appeals. Nor could he well do so. The claim for taxes, being non-maritime, could not have been set forth in the libel. Compare *The Steamboat Orleans* v. *Phoebus,* 11 Pet. 175, 182. To defer presenting the claims for taxes until after the final decree adjudicating the right to the property was not dilatory conduct. Obviously, there would have been no occasion to proceed against the property for collection of the tax if the alcohol had been declared forfeit to the United States.

Second. Rizzo contends that the tax sought to be recovered is a penalty imposed for violation of the National Prohibition Act; hence uncollectible, because of the repeal of the Eighteenth Amendment. *United States* v. *Chambers,* 291 U. S. 217. But this tax is not a penalty. It is the basic tax upon distilled spirits irrespective of their legal or illegal origin. *United States* v. *One Ford Coupe,* 272 U. S. 321, 328; *Various Items of Personal Property* v. *United States,* 282 U. S. 577, 579. A lien attaches to alcohol "as soon as it is in existence as such" and continues until the tax is paid. Rev. Stat. §§ 3248, 3251; *Thompson* v. *United States,* 142 U. S. 471, 474. That lien is valid against all transferees, without assessment, distraint or other administrative proceedings. *Alkan* v. *Bean,* 1 Fed. Cas. No. 202, p. 418; *United States* v. *Turner,* 28 Fed. Cas. No. 16,548, p. 232.

Rizzo objects here that the alcohol does not appear to have been of domestic manufacture. His answer in the District Court stated that it was not imported; and there is no showing that it was. As the alcohol was subject to the tax, the burden rested upon him to

[1] Rizzo had filed with the clerk notices of assignment of the proceeds in amounts aggregating nearly the whole of the deposit.

prove payment. Rev. Stat. § 3333, as amended. No evidence to that effect was introduced. The contrary was established.

Third. Rizzo contends that the United States is estopped from collecting the tax, because it elected to seek forfeiture for violation of the National Prohibition Act. But the Government made no such attempt. The libel sought forfeiture on four grounds. Three of them were for violation of provisions in the Tariff Act of 1930, June 17, 1930, c. 497, 46 Stat. 590. The fourth was for violation of the navigation laws. Rev. Stat. § 4377. The District Court decreed forfeiture on the fourth ground, without passing on the other three. The petition presented to the Circuit Court of Appeals has no relation to navigation or customs laws. It states a claim based solely upon the internal revenue laws. The present proceeding is thus founded on a right distinct from, and entirely consistent with, the rights theretofore asserted. Compare *United States* v. *One Ford Coupe*, 272 U. S. 321, 327, 333-334. No reference was made in the libel, and no evidence was introduced in the District Court, with respect to the tax due upon the domestic production of alcohol. There is no basis for the contention that the United States is estopped by an election of remedies. Compare *Southern Pacific Co.* v. *Bogert*, 250 U. S. 483, 490-491.

Fourth. Rizzo contends that the United States is also barred because its counsel agreed, when the terms of sale were framed, that the proceeds should be answerable only to the causes of forfeiture set forth in the libel and that any tax lien should be waived. There was no such agreement. The notice of the "terms and conditions under which the sale will be conducted" (to which counsel for the Government is alleged to have consented) recited: "3. The cargo of alcohol which is being sold is to be sold free and clear of all claims of any kind or character". The order of sale had provided that "all further proceedings herein shall be against said proceeds of sale". Thus it was in the common form authorized by Admiralty Rule 40, which is interpreted as transferring all existing liens from property to proceeds. Compare *The Lottawanna*, 20 Wall. 201, 211, 221; *Schuchardt* v. *Ship Angelique*, 19 How. 239, 241. Since counsel did not agree to waive the tax lien on the proceeds, and since the Court of Appeals made no finding of such a waiver, we need not consider whether a United States Attorney had authority to waive the Government's right. Compare *Utah* v. *United States*, 284 U. S. 534, 545-546.

Fifth. Rizzo contends that the Circuit Court of Appeals sitting in admiralty lacks jurisdiction to enforce the lien for taxes. The argument is that collection of internal revenue taxes must be effected in accordance with prescribed statutory methods; and that the Act of February 26, 1926, c. 27, § 1115, 44 Stat. 117, and Rev. Stat. § 838 provide specifically for collection by the Collector of Internal Revenue through proceedings specified. But compare Rev. Stat. § 3213. The order of the appellate court confirming the sale deprived the Government of two of the statutory methods. First, the right to forfeit the alcohol even after it had been transferred to a bona fide purchaser while in a container not properly stamped, Act of January 11, 1934, c. 1, Title II, § 206, 48 Stat. 317. Second, the right to collect the taxes from the purchaser under the court's order, Rev. Stat. § 3334, as amended by Act of March 1, 1879, c. 125, § 5, 20 Stat. 340. But in ordering sale of the alcohol free of liens, the Court of Appeals in effect provided, in accord with the common practice, that existing liens should attach to the proceeds. Compare *Terre Haute & L. Ry.* v. *Harrison,* 96 Fed. 907, 911. These being *in custodia legis,* it was proper to petition that they be applied towards satisfaction of the tax. Compare *Marshall* v. *New York,* 254 U. S. 380, 384-385; *In re Tyler,* 149 U. S. 164, 182-183, 187. The practice prevails in admiralty as in other courts. In *Schuchardt* v. *Ship Angelique,* 19 How. 239, 241, where proceeds of the sale of a mortgaged ship had been paid into the registry, the Court, refusing to entertain a "libel simply to foreclose a mortgage, or to enforce the payment of a mortgage", said: "As the fund is in the custody of the admiralty, the application must necessarily be made to that court by any person setting up an interest in it. This application by petition is frequently entertained for proceeds in the registry, in cases where a suit in the admiralty would be wholly inadmissible." Admiralty Rule 42; compare *The Lottawanna,* 21 Wall. 558, 582-583; *The J. E. Rumbell,* 148 U. S. 1, 15. The practice prevails in appellate courts as well as in courts of original jurisdiction. Compare *In re Antigo Screen Door Co.,* 123 Fed. 249, 251-252.

Sixth. Finally, Rizzo contends that this Court lacks jurisdiction because the order appealed from does no more than carry out another order not here for review. This is not true. The United States seeks to enforce against property in the possession of the Circuit Court of Appeals a right which had not theretofore been liti-

gated, and which was not barred by earlier proceedings. If the Government had been a stranger to the litigation it would have been entitled to intervene; compare *Savannah* v. *Jesup,* 106 U. S. 563, 564-565; *Krippendorf* v. *Hyde,* 110 U. S. 276, 282-283; *Gumbel* v. *Pitkin,* 113 U. S. 545, 547-548; 124 U. S. 131; and a denial of intervention would have been reviewable as a final judgment; compare *Central Trust Co.* v. *Grant Locomotive Works,* 135 U. S. 207, 224-225; *Credits Commutation Co.* v. *United States,* 177 U. S. 311, 315-316; *Clark* v. *Williard,* 292 U. S. 112, 117-119. Its right to have the new issue adjudicated is not to be denied because it was already a party to the suit. Compare *In the Matters of Howard,* 9 Wall. 175, 183. The cases which hold that merely administrative proceedings under a decree may not be brought here for review have no application. See *Wynkoop, etc., Co.* v. *Gaines,* 227 U. S. 4. Compare *Collins* v. *Miller,* 252 U. S. 364, 370-371; *Farmers' Loan & Trust Co., Petitioner,* 129 U. S. 206.

The order is reversed with direction to the Circuit Court of Appeals to pay to the United States the proceeds of the sale now in the registry after deducting the usual court charges.

Reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.